TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 947.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. R. HAROLD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED SEPTEMBER 11, 1916.

(24,564)

(24,554)

SUPREME COURT OF THE UNITED STATES.

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No. 347.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1915.

* * * * * * *

1–7 19051. Filed Feb. 2, 1914. D. C. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 19051.

J. R. HAROLD, Appellee,
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

Appeal from Sedgwick District Court, Hon. Thornton W. Sargent, Judge.

Abstract of the Record on Behalf of Appellant.

William R. Smith, Owen J. Wood, Alfred A. Scott, Attorneys for Appellant.

8 In the Supreme Court of the State of Kansas.

No. 19051.

J. R. HAROLD, Appellee,
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

Appeal from Sedgwick District Court, Hon. Thornton W. Sargent, Judge.

Abstract of the Record on Behalf of Appellant.

The above named appellee filed his bill of particulars against the Railway Company, defendant below, in the City Court of Wichita on January 17, 1912, alleging the following facts:

Bill of Particulars.

Plaintiff for his cause of action against the defendant, alleges:

That he is in the grain business, engaged in the buying and selling of grain, at Wichita, Kansas.

That defendant is incorporated under and by virtue of the
9 laws of the State of Kansas, and is engaged in the business of a common carrier within the state of Kansas, and as such operates a railroad and is engaged in the business of carrying freight

between Kansas City, Missouri, and Elk Falls, Kansas, and in and through Sedgwick County, Kansas.

That on the 14th day of September, 1910, plaintiff sold to Shoe & Jackson, of Elk Falls, Kansas, one car of No. 3 shelled corn, to be shipped within seven days from that date and to be delivered to said Shoe & Jackson F. O. B. at Elk Falls, Kansas, and said Shoe & Jackson agreed to pay for such a car of corn so shipped as aforesaid, at the rate of 63 cents per bushel.

That on or about said date, this plaintiff bought of the Nevling Elevator Company of Wichita, Kansas, for the purpose of applying on said sale to Shoe & Jackson, one car of No. 3 shelled corn, to be shipped to said Shoe & Jackson at Elk Falls, Kansas, not later than September 21, 1910.

That said Nevling Elevator Company, pursuant to said sale, delivered to this plaintiff one bill of lading issued by defendant company, which bill of lading was transferable and acknowledged receipt by defendant at Kansas City, Missouri, on September 21, 1910, of car No. L. W. 33791, containing 101,000 pounds of shelled corn, to be delivered to the Nevling Elevator Company at Elk Falls, Kansas; said defendant by said bill of lading, agreeing and contracting in consideration of the legal freight rate to transport said 101,000 pounds of corn with reasonable dispatch to Elk Falls, Kansas, and there to deliver said corn to the holder of said bill of lading issued by defendant.

That upon receipt of said bill of lading from said Nevling Elevator Company this plaintiff paid said Nevling Elevator Company in full for said car of corn, relying upon the representations contained in said bill of lading issued by said defendant company as aforesaid.

10 That said car containing 101,000 pounds of corn had been shipped over defendant's road from Kansas City, Missouri, on September 21, 1910, to Elk Falls, Kansas, and relying on the contract of defendant, as evidenced by said bill of lading, to deliver said 101,000 pounds of corn to the holder of said bill of lading at Elk Falls, Kansas, in a reasonable time.

That this plaintiff had said 101,000 pounds of corn sold to said Shoe & Jackson at Elk Falls, Kansas, if delivered there within a reasonable time after September 21, 1910, at a price of 63 cents per bushel, or a total price of $1,136.25.

That he bought said car of corn from said Nevling Elevator Company to fulfill his said contract of sale to said Shoe & Jackson, and relied upon the delivery of said car of corn to fulfill his said contract with Shoe & Jackson.

That defendant company failed and neglected to deliver said car, L. W. No. 33791, containing 101,000 pounds of corn, at Elk Falls, Kansas, within a reasonable time, or at all.

That on the 11th day of October, 1910, said defendant delivered to this plaintiff at Elk Falls, Kansas, upon surrender of said bill of lading, S. P. Car No. 85721, defendant representing and stating to plaintiff that said car contained the corn originally shipped under said bill of lading in Car L. W. No. 33791.

That said car S. P. No. 85721 contained but 99,000 pounds of corn when delivered to plaintiff at Elk Falls, Kansas.

That by reason of the negligence of defendant in failing to deliver said car of corn shipped under said bill of lading at Elk Falls within a reasonable time after September 21, 1910, said car not being delivered at Elk Falls until twenty days after same was received
11 by defendant at Kansas City, Missouri, said Shoe & Jackson refused to accept said car of corn to apply on their said contract of purchase of the corn from this plaintiff.

That because of said Shoe & Jackson's refusal to accept said car to apply on said sale to them by plaintiff, this plaintiff was compelled to sell said car of corn on the open market for the market price on the day of such sale.

That this plaintiff, although he used his best efforts to sell said car of corn at once and for the highest possible price, was unable to sell said corn until the 14th day of October, 1910, and was able to get for said corn but 55 cents per bushel. That his total proceeds from the sale of said car under such circumstances was $972.33.

Plaintiff alleges that he bought said car L. W. 43791, containing 101,000 pounds of corn, relying upon defendant's contract to deliver said 101,000 pounds of corn at Elk Falls, Kansas, with reasonable dispatch, and relied upon the delivery of said corn as aforesaid to fulfill his contract of sale of the car of corn to Shoe & Jackson at Elk Falls, Kansas, within a reasonable time after September 21, 1910, at a price of 63 cents per bushel.

That because of the gross negligence and carelessness on the part of defendant company in failing to deliver said 101,000 pounds of corn at Elk Falls, Kansas, to the holder of the bill of lading issued by said defendant within a reasonable time after the receipt of said corn by defendant at Kansas City, Missouri, this plaintiff was unable to apply said car of corn on his contract of sale of a car of corn to said Shoe & Jackson as aforesaid, but was obliged to and did sell said corn for a price of $972.33.

That if defendant had delivered said car L. W. No. 33791, containing 101,000 pounds of corn, to the holder of the bill of
12 lading issued therefor in accordance with the terms of said contract of shipment, this plaintiff would have received for said car of corn, the sum of $1,136.25.

That by reason of the gross negligence and carelessness of the defendant in failing to deliver said corn in compliance with said contract of shipment, this plaintiff was damaged in the sum of $163.90.

That said bill of lading so issued by defendant as aforesaid is not now in the possession of this plaintiff, but was surrendered to defendant company upon receipt from them of said car S. P. No. 85721.

That defendant company charged a rate of nine and one-half cents per hundred pounds on 101,000 pounds received by them in said car L. W. No. 33791 for the transportation of said corn to Elk Falls, Kansas.

That said freight bill charged for said transportation amounted

to $95.95, which sum of $95.95 was paid by this plaintiff to defendant upon receipt by him from defendant of said car S. P. No. 85721.

That said car in fact contained but 99,000 pounds of corn and that defendant company did not transport for or deliver to plaintiff said 101,000 pounds of corn, and failed and neglected to deliver two thousand pounds of said corn.

That defendant company charged nine and one-half cents per hundred for transporting said two thousand pounds of corn, which they failed to transport, and this plaintiff paid defendant nine and one-half cents per hundred for delivering said two thousand pounds of corn, which they failed to transport.

That by reason of defendant's action in compelling this plaintiff to pay said excess freight in the sum of $1.90, this plaintiff is damaged in the sum of $1.90.

That written demand was made on defendant on this claim Dec. 23, 1910.

13 That plaintiff is entitled to a reasonable attorney fee to be paid to this plaintiff herein for services rendered in this case, which reasonable attorney fee is one hundred dollars ($100).

Wherefore, plaintiff prays for judgment against defendant in the sum of one hundred sixty-five dollars and eighty-two cents ($165.82), together with a reasonable attorney fee of one hundred dollars ($100), and for his costs in this action incurred.

(Here follows bill of lading marked pages 14 and 15.)

Form 18-A Regular — Hall 2 13 50M 4588

Uniform Bill of Lading—Standard Form of Order Bill of Lading approved by the Interstate Commerce Commission by Order No. 787, of June 27, 1908.

The Atchison, Topeka & Santa Fe Railway Company.

EXHIBIT "A."

Shippers No._____

ORDER BILL OF LADING—ORIGINAL.

Agents No._____

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading,

at Kansas City, Mo. 9/21 1910

from C. V. Fisher Grain Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

*The Rate of Freight from*_____

*to*_____ *is in cents per 100 Lbs.*

IF..Times 1st	IF 1st Class	IF 2d Class	IF 3d Class	IF 4th Class	IF 5th Class	IF A Class	IF B Class	IF C Class	IF D Class	IF E Class	IF Special per____	IF Special per____

(Mail Address—Not for purposes of Delivery.)

Consigned to **ORDER OF** C. V. Fisher Grain Co.,

Destination, Elk Falls State of Kansas County of

Notify Nevling Elev. Co.

Elk Falls State of Kansas County of

J. W. Dayton.
The Nevling Elevator Co. per Miller.
J. R. Harold Grain Co. per Harold.

The National Bank of Commerce of Wichita, assumes no liability for any contract that may exist between the consignor and consignee of the commodity covered by the bill of lading hereto attached, nor will it be responsible for the quality, quantity or condition of the grain represented by said bill of lading.

The payment of this draft will be an acceptance of the condition named herein.

NOTICE.--The Commerce Trust Company of Kansas City, Missouri, does not by purchasing this bill of lading, or otherwise, guarantee either the quantity, quality, or delivery of the property covered by the bill of lading, and will not be responsible to any one paying the draft hereto attached for any representation, contract or conduct of any other party.

ENDORSEMENTS.

CONDITIONS.

16 The case was thereafter appealed to the District Court of Sedgwick County, Division No. 2, and the defendant filed in that Court its

Answer to Bill of Particulars of Plaintiff.

And now comes the said defendant, The Atchison, Topeka and Santa Fe Railway Company, and for its answer to the bill of particulars filed herein by plaintiff,

1. States that it denies each and every allegation, averment and statement in said bill of particulars contained, except such as are hereinafter specifically admitted.

2. Defendant admits that it was and is a railway corporation, as alleged in plaintiff's bill of particulars.

3. Defendant further admits that the bulk corn mentioned in plaintiff's bill of particulars was shipped over the defendant's railway, but alleges the fact to be that the original shipment of said corn originated on the line of the Union Pacific Railroad Company at Yanka, Nebraska, September 21, 1910, and the same was billed from said Yanka, Nebraska, by James Bell & Son, notify C. V. Fisher Grain Company, and that at Topeka, Kansas, the grain was transferred from L. W. car No. 33791, in which it was originally shipped, to Southern Pacific car No. 85721, by reason of the car in which said *car* was carried over the Union Pacific Railroad being in bad order and leaking when it arrived at Topeka. After the receipt of said car by the defendant company it was transported in due and reasonable time to its destination at Elk Falls, Kansas.

17 Defendant further avers that said corn was shipped over the lines of The Atchison, Topeka and Santa Fe Railway Company, the defendant herein, under a bill of lading or contract in writing, the original of which is attached to the deposition of H. C. Pribble and marked Exhibit "A"; which said deposition was taken at the office of William R. Smith, Solicitor for defendant, at Topeka, Kansas, on Monday, the 4th day of August, 1913, and same is referred to and made a part of this answer.

Under the conditions of said shipping contract and bill of lading, it is provided, as a part thereof, as follows:

"No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law; but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed."

The third paragraph on the back of said shipping contract, in Section 3 thereof, reads as follows:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

The said conditions above set out were and are binding on the plaintiff herein, and defendant avers that the injury to and loss of corn sued for herein occurred on the 11th day of October, 1910, as set forth and alleged in plaintiff's bill of particulars, but that this action was not brought against the defendant until the 17th day of January, 1912.

Wherefore, the defendant prays judgment against the plaintiff for the costs of this action.

18 *Trial.*

Under these issues the case came on for trial on August 11, 1913, and was tried to the court without a jury. Following is an abstract of the material evidence given at the trial.

Plaintiff's Evidence.

O. L. JACKSON testified: During the months of September and October, 1910, I was in the feed business at Elk Falls, Kansas, being a member of the firm of Shoe & Jackson, operating the Elk Falls mill. On or about September 14, 1910, Shoe and Jackson contracted with J. R. Harold, who was in the grain business at Wichita, to buy a car-load of grain on seven days' delivery. The contract was made over the phone. The purchase was made September 15, 1910. We afterwards received a bill of lading of a car of corn to apply on that contract. The bill of lading is not in my possession. The number of the car covered by that bill of lading was 33791. I never received that particular car of corn. The railroad delivered to us a car of corn instead of the above numbered car on the said bill of lading. It was car S. P. 85721. The defendant delivered that car containing corn upon the bill of lading issued by them for car No. 33791 on October 14, 1910. We did not accept this car of corn from Harold to apply on our contract of purchase at the price agreed upon. We had agreed to pay Harold for a car of corn upon the contract of purchase above mentioned, 63 cents per bushel f. o. b. Elk Falls. We refused to accept the car of corn tendered us by the defendant on the bill of lading we held, because we bought
19 the car at 63 cents per bushel on a seven days' shipment, and the car did not arrive for about thirty days, and the price had then declined to 55 cents per bushel. Later, we bought this same car of corn from Harold at the market price of 55 cents per bushel, f. o. b. Elk Falls. It was to be taken on our weights, standard scales. I weighed this car of corn at Elk Falls. When delivered to us there it contained 99,000 pounds of corn, for which quantity we paid Harold at 55 cents per bushel. According to the bill of lading this corn was received by the defendant about the 21st of September, 1910. The bill of lading showed that the defendant received this corn for shipment at Kansas City. The usual time that it takes cars of grain to come from Kansas City to Elk Falls over defendant's road is about two days.

Cross-examination:

I have no positive knowledge of my own that this car, 85721 S. P., was in transit more than two days. We buy the grain in the car and not the car. This might have been the same grain as was in the car that we held the bill of lading for. For all I know it might be a mistake in the bill of lading as to the number of the car. I do not know positively of my own knowledge that the grain I bought was in transit any number of days. All the positive information I had is that the grain we bought was to be shipped in seven days, and we received the car in thirty days afterwards. I weighed the grain myself over Howe scales. The railroad does not have scales at Elk Falls. The County Clerk tested our scales the last of August, or the first of September, 1910. I reduced the weights to figures when taken, and have a record of them. I haven't them here. I think I have made mistakes in figuring sometimes. I do not think I was mistaken in this. I based the fall in price on the Kansas City market. I was conv[illegible]ant with market prices at Kansas City during the time between the date of buying the car and the date of delivery to me. Corn began to fall about the 1st of October. We were offered corn at 55 cents f. o. b. Elk Falls on the day we received the car.

H. C. PRIBBLE testified: I am Freight Claim Auditor of the A. T. & S. F. Ry. Co. I am familiar with the manner in which records of freight shipments are kept on the line of the Santa Fe Railway. I have the investigation file of papers which reflects the station records showing just how the car of bulk corn involved in this action was handled from its origin to its destination. This appears from a record made at the time of each transaction by the agent. The information was compiled from the various station records. L. W. car 33791 was loaded with bulk corn at Yanka, David City, Nebraska, September 21, 1910, by J. Bell & Son, who consigned it via Union Pacific Railroad Company to the order of J. Bell & Son, notify C. V. Fisher Grain Company at Topeka, Kansas. This is what is known as a shipper's order shipment. The original shipper's order bill of lading, issued by the Union Pacific Railroad Company to cover this movement, was taken up by the C. V. Fisher Grain Company at Kansas City, Missouri, which means that they paid the shipper's draft and came into possession of the car. The C. V. Fisher Grain Company took this bill of lading to the Santa Fe General Agent at Kansas City, Mr. G. E. Roe, and obtained in exchange for it a bill of lading dated September 21, 1910, but which bill of lading, as a matter of fact, was given September 24, 1910, there being an error in the date on the bill of lading.

(The original bill of lading above mentioned, issued by G. E. Roe, Agent of the Santa Fe, was made a part of the deposition and marked Exhibit "A.")

According to the orders of C. V. Fisher Grain Company, as shown by this bill of lading, the car was reconsigned to the order of C. V. Fisher Grain Company, Elk Falls, Kansas, notify Nevling Elevator Company, Elk Falls, Kansas. The notation on

Exhibit "A" reading "Transfer to S. P. 85721 at No. Topeka," is explained as follows: The car of corn arrived at North Topeka, September 28, 1910, and was set by the Union Pacific Railroad Company to the A. T. & S. F. Ry. Co. the same date, but was set back by the A. T. & S. F. Ry. Co. to the Union Pacific R. R. Co. on September 30, 1910, on account of said car being in bad order, which is to say, it was not considered in proper condition for transportation to destination. The Union Pacific R. R. Co. accepted the car back and set it to the Kaw Milling Company's elevator at North Topeka, Kansas, to be transferred to other equipment. The transfer was made by the Kaw Milling Company October 6, 1910, to So. Pacific Railroad Company's car 85721, and upon the same day, October 6, 1910, the Union Pacific R. R. Co. sent S. P. car 85721 to the A. T. & S. F. Ry. Co. for transportation to Elk Falls, Kansas, in accordance with the bill of lading given by George E. Roe. S. P. car 85721 was accepted by the A. T. & S. F. Ry. Co. and transported to its destination, Elk Falls, Kansas, where it arrived October 9, 1910. The car never went to Kansas City. The original purchaser was the C. V. Fisher Grain Company, located at Kansas City, and the reason that an exchange bill of lading was given at Kansas City, Missouri, was simply that the original purchaser was located at that point and there was no necessity for the car going through Kansas City, Missouri, on its way to final destination for delivery to the parties to whom C. V. Fisher Grain Company sold it. The original bill of lading surrendered to the Santa Fe Company at Elk Falls is attached
22 hereto, marked Exhibit "A." It is the practice among railroad companies for the receiving carrier to decline to accept from the delivering carrier any cars which upon proper mechanical inspection are not considered in a safe or reliable condition for the transportation of the commodity to its destination.

E. W. JETTE testified: I am freight agent for the Union Pacific R. R. Co. at Topeka, Kansas. I have had about 19 years' experience with the Union Pacific and other railroads in the capacity of telegraph operator and local agent. I am familiar with the manner in which the records of freight shipments are kept on the line of the Union Pacific Railroad. Have had several years' experience in keeping those records myself. L. W. car 33791 arrived at Topeka on the Union Pacific R. R. on extra east, Conductor Foster, September 28, 1910. This car contained corn, destination Elk Falls, Kansas. The car was delivered to the A. T. & S. F. Ry. Co. at Topeka, Kansas, September 28, 1910, and was set back to the Union Pacific R. R. Co. by the A. T. & S. F. Ry. Co. on September 30, 1910, on account of bad order. This car was found to have one side door post broken loose at the bottom of the post, and was leaking grain slightly, and as the car could not be repaired while under load, the Union Pacific R. R. Co. received the car back from the A. T. & S. F. Ry. Co. and placed same to the Kaw Milling Company's elevator for the purpose of having the contents of the car transferred to other equipment, in order that the shipment would be in condition to move to its destina-

tion. On October 6, 1910, the Kaw Milling Company transferred the contents of L. W. car 33791 into S. P. car 85721, and on October 6, 1910, S. P. 85721 was delivered to the A. T. & S. F. Ry. Co., to be transported to its destination. All the statements I have made above appear from the written records on file in my office as agent for the Union Pacific R. R. Co., which records are regularly kept and are on file as part of the daily transactions of said Railway Company. I have in my possession the original order bill of lading issued by the Union Pacific R. R. Co. to James Bell & Son at Yanka, Nebraska, and hand a copy thereof to the notary to be attached to a copy of my deposition and marked Exhibit "B."

23

J. R. KOONTZ testified: I am General Freight Agent of the A. T. & S. F. Ry. Co., and have been such about ten years. It is a part of my duties to familiarize myself with freight rates over our own and other lines of railway. On a shipment of bulk corn from Yanka, Nebraska, through Topeka via Union Pacific R. R. and A. T. & S. F. Ry. to Elk Falls, Kansas, there is no difference in rate charged by different railways between the point of origin and the point of shipment. I mean by this that the rate on this commodity would be the same whichever line of road it might have taken from origin to destination through Topeka.

No evidence was offered on behalf of defendant.

It was agreed that if the plaintiff was entitled to recover attorney's fees, $50 would be a reasonable amount, including the District Court and the City Court.

It was admitted by defendant that demand was made by the plaintiff of the defendant on this claim December 23, 1910. It was further admitted by the defendant that the car of corn in question, car 33791, was sold by the Nevling Elevator Company to J. R. Harold, plaintiff herein, on the 14th day of September, 1910, and that the bill of lading set out in defendant's deposition herein, issued by the Santa Fe Railway Company, was delivered, attached to draft to the plaintiff herein, by the Nevling Elevator Company, and that the plaintiff claimed under that bill of lading.

24

It was further admitted by the defendant that the freight receipt offered in evidence by the plaintiff showing payment to the Santa Fe Railway Co., on October 17, 1910, to W. P. Watts, Agent, $96.74, freight on car 85721, is the freight bill issued by the defendant Railway Company.

EXHIBIT "B."

This was a standard form of bill of lading approved by the Interstate Commerce Commission, issued by the Union Pacific Railroad Company, dated Yanka, Nebraska, September 21, 1910, to James Bell & Son, for 100,420 pounds of bulk corn, contained in L. W. car No. 33791, destination Topeka, Kansas, consigned to order of James Bell & Son, notify C. O. Fisher Grain Company, care of Santa Fe for

shipment. It was signed J. Bell & Son, shipper; J. W. Schofield, Agent. It bore the indorsement "Deliver to Fisher Grain Com. J. S. Bell & Son." It contained the same conditions as are on the back of the bill of lading marked Exhibit "A" and contained in this abstract.

EXHIBIT "C."

The Nevling Elevator Co., 210 Sedgwick Bldg.

WICHITA, KANSAS, Dec. 23, 1910.

78042.

A. T. & S. F. Ry. Co., City.

GENTLEMEN: Herewith our claim for loss in transit and decline in price.

Our No. A-142 on shipment of bulk corn from Yanka, Nebr. 9-23-10 to Elk Falls, Kansas. S-O Nfy. The Nevling Elevator Co. Car 85721 SP Xcar 33791 LW

Loaded into this car	100420 lbs.
Destination weights	99000 lbs.
Lost in transit	1420 lbs.
Less ¼ of 1% shrink	250 lbs.
Claim based on	1170 lbs.

1170 lbs. 20:50 bu. corn@63c per bu. del'd, Elk Falls.... $13.50

Freight collected on 101,000 lbs.

Claim for loss in transit..... $13.50

Claim for delay in movement and decline in price as follows:

Corn sold 9-14@63c dld. Elk Falls for seven days' shipment.

Corn accepted 10-17@55c Elk Falls account decline in price of corn.

99,000 lbs. or 1,767.48 bu.@8c per bu. difference in price.. $141.42

Claim for shortage	$13.15
Claim for decline in price	141.42
Total amount of this claim	$154.57

Find attached hereto:

Affidavit of loading weights; affidavit of unloading weights; original paid expense bill; copy of confirmation of sale; copy of invoice; affidavit of actual loss (account decline in price)

sustained by consignee; original bill presented by consignee; correspondence from W. C. Garvey, Agt., and C. A. Brown.

Kindly make settlement as promptly as possible and oblige.

Yours truly,

THE NEVLING ELEVATOR CO.

EXHIBIT "D."

Freight Bill.

Order Fisher Grain Co., Elk Falls. 10-10-1910.

Notify Nevling Elevator Co. Freight Bill No. 71.

To the Atchison, Topeka & Santa Fe Railway Co., Dr.

Way-bill.		Car.		From—	Original point shipment and consignor.
Date.	No. and	Initials.	No.	Topeka.	
9-30	Series 382	SP	85721	UP 2155	Yanka

For freight and charges on—	Weight.	Rate.	Freight.	Advances.	Total.
Bulk Corn.....	101,000	9½	$95.95	.79	$96.74

Received Payment, October 17, 1910.

W. P. WATTS.

Judgment.

The Court rendered judgment in favor of the plaintiff and against the defendant for the sum of $165.80 as prayed for, with interest thereon from the 1st day of October, 1910, to the 27th day of August, 1913, amounting to $29.00, and also for an attorney's fee of $50.00.

28

Motion for a New Trial.

Defendant duly filed a motion for a new trial, which was overruled by the Court.

Notice of Appeal.

Notice of appeal from said judgment was duly served upon the attorneys for the plaintiff on September 18, 1913, and was filed in the office of the Clerk of the District Court on September 20, 1913, and a certified copy of same, together with a certified copy of the journal entry of judgment, has been duly filed in the Supreme Court. A transcript of the stenographer's notes of the testimony and the proceedings in said case, duly certified by the court stenographer, was filed in the District Court on December 8, 1913.

The above and foregoing is a true and correct abstract of the record in the above entitled case.

Specification of Errors.

The District Court erred:

29 & 30½ 1. In rendering judgment in favor of the plaintiff and against the defendant, as prayed for in the petition of the plaintiff.

2. In rendering judgment in favor of the plaintiff and against the defendant for an attorney's fee.

3. In overruling defendant's motion for a new trial.

WILLIAM R. SMITH,
OWEN J. WOOD,
ALFRED A. SCOTT,
Attorneys for Appellant.

* * * * * * *

31 And afterwards, on the 12th day of December, 1914, the same being one of the regular judicial days of the July term, 1914, of the supreme court of the state of Kansas, before said court in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record in the words and figures, as follows, to-wit:

32 In the Supreme Court of the State of Kansas, Saturday, December 12, 1914.

No. 19051.

J. R. HAROLD, Appellee,
vs.
THE A., T. & S. F. R'L'Y CO., Appellant.

Journal Entry of Judgment.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $—, and hereof let execution issue.

33 And on the same day, to-wit the 12th day of December, A. D. 1914, there was filed in the office of the clerk of the supreme court of the state of Kansas, the syllabus and opinion of the court, which syllabus and opinion *is* in the words and figures, as follows, to-wit:

34 Filed Dec. 12, 1914. D. A. Valentine, Clerk Supreme Court.

No. 19051.

J. R. HAROLD, Appellee,
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

Appeal from Sedgwick County, Division No. 2.

Affirmed.

Syllabus by the Court.

BENSON, *J.:*

1. The rule which invests the innocent holder of a bill of lading with rights not available to the shipper, declared in Savings Bank v. A. T. & Santa Fe Rld. Co., 20 Kan. 519; Railway Co. v. Hutchings, 78 Kan. 758, 99 Pac. 230; and Hutchings v. Railway Co., 84 Kan. 479, 114 Pac. 1079; is followed in a case where the plaintiff purchased corn described in a bill of lading, and paid the shipper's draft attached to the bill in the usual course of business.

2. The provisions of section 7107 of the General Statutes of 1909, allowing an attorney's fee upon the prosecution of claims for damages against a railway company for shortage on shipments of grain, seed, or hay, are not obnoxious to the federal regulations of interstate commerce.

All the Justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

35 No. 19051.

The opinion of the court was delivered by

BENSON, *J.:*

The plaintiff, a grain dealer at Wichita, seeks to recover damages from the railway company for failure to deliver in a reasonable time a carload of shelled corn at Elk Falls, in accordance with a bill of lading issued by the company at Kansas City, Missouri.

On September 14, 1910, the plaintiff sold to Shoe & Jackson a car of No. 3 shelled corn to be shipped to Elk Falls within seven days. On the same day the plaintiff purchased car No. L. W. 33791 of bulk corn from the Nevling Elevator Company at Wichita which endorsed to him a bill of lading issued by the defendant, dated

September 21, 1910, showing the receipt of the corn on that day at Kansas City, Missouri, from C. V. Fisher Grain Co., consigned to order of the shipper at Elk Falls, "Notify Nevling Elevator Company". The plaintiff paid a draft attached to the bill.

The corn did not arrive at Elk Falls until October 9, and because of the delay was not accepted by Shoe & Jackson. The sale had been made at 63 cents per bushel, which plaintiff would have received had it been delivered in a reasonable time after September 21. By reason of a decline in the market it was worth only 55 cents per bushel on arrival, and was sold by the plaintiff at that price. Moreover there had been a loss of 2,000 pounds in transportation.

It appears that the shipment intended to be described in the bill of lading originated at Yanka, Nebraska, on the Union Pacific Railway and was billed on the car L. W. 33791 by James Bell & Son to shipper's order, Topeka, notify C. V. Fisher Grain Co., care of Santa Fe, for shipment. The bill was dated at Yanka, September 21, and was endorsed by Bell & Son to Fisher Grain Company. That company paid the shipper's draft, took the bill of lading to the defendant's agent at Kansas City and received in exchange the bill of lading, first referred to, on the 24th day of September instead of the 21st day of September, the date named in the instrument. The car arrived in Topeka on September 28, and was *set* by the Union Pacific Company to the Atchison, Topeka & Santa Fe Railway Company, but on September 30, it was *set* back to the Union
36 Pacific Company because the car was in bad condition. The Union Pacific Company then sent it to an elevator where the corn was transferred to another car and on October 6 was *set* to the Atchison, Topeka & Santa Fe Railway Company, and by that company was moved to Elk Falls. It was never at Kansas City. The issuance of the last bill of lading at Kansas City on the 21st of September for corn that did not reach the Santa Fe Railway until September 28, is explained by the defendant as an error in the date of the bill.

The contention of the plaintiff is that having received the bill of lading in the usual course of business, showing a shipment on September 21, which was in time to meet the requirements of his contract of sale, he relied upon the statements in the bill, and that the defendant is responsible for the natural and probable consequence of its error or mistake in issuing it. He had no notice from the bill or otherwise that the shipment originated over another line, or at another place, or that the corn was never in Kansas City, or that the date was wrong, or that the car was in bad order; and insists that the company was bound to know that the bill of lading might in the ordinary course of business be negotiated and transferred to an innocent purchaser.

The defendant contends that having carried the corn to its destination within a reasonable time after it was in fact received it is not liable for any loss caused by error in the date of the receipt shown upon the bill or by the bad condition of the car or otherwise. Attention is called to the fact that the corn was not in fact received by the defendant until after the time limit for shipment agreed upon

in the plaintiff's contract of sale had expired. It is also argued that a wrong measure of damages was applied.

The first question to be decided is whether as against the plaintiff, the company is bound by the statements in its bill of lading, which is in the usual standard form, approved by the Interstate Commerce Commission, showing an original shipment at Kansas City to Elk Falls to shipper's order. The defendant refers to the instrument as an exchange bill of lading, but there is noth-
37 ing upon it to indicate that it was so issued, and the plaintiff had no knowledge that the facts were not as stated in the instrument. Practically the same question was presented in Railway Co. v. Hutchings, 78 Kan. 758, 99 Pac. 230, and Hutchings v. Railway Co., 84 Kan. 479, 114 Pac. 1079. In the first opinion in that case conflict in authority upon the question whether a carrier may be held liable to an innocent holder upon a bill of lading where it has not received the goods, was fully considered, and it was held, following the decision in Savings Bank v. A., T. & Santa Fe Rld. Co., 20 Kan. 519, that the carrier is liable in such a case "because the knowledge whether the goods have been received, and therefore the power in fact conferred, lies peculiarly with the carrier's agent, who is held out to the public as having authority to make a statement upon which innocent parties may rely, and the carrier is therefore estopped to deny the receipt of the goods as stated in the bill." (Syl. 2, (*b*). In the second opinion in that case, the effect of a Missouri statute relating to bills of lading was considered, and the rule in Kansas was held to prevail in that state also by force of the statute, the bill of lading having been issued there. Although that statute is not invoked in this case, it will be presumed that the law in Missouri is the same as in Kansas.

It is unnecessary to re-state the arguments or refer further to the authorities upon which the rule is established by the decisions referred to, which invests the innocent holder of a bill of lading with rights not available to the original shipper. Having been fully considered and approved the rule is adhered to.

No material difference in principle is discovered between a case where a bill of lading comes into the hands of a banker who has paid a draft drawn against the shipment, as in the Hutchings case, and a case where the commodity is bought by an innocent holder to whom the bill is transferred in the usual course of business. Nor is there any difference in the legal consequences flowing from a bill issued without the receipt of the goods at any time, and one issued before the goods are received provided a loss falls upon the transferee in the usual course of business as a direct consequence of the misstatement.

38 Upon the question of damages it is sufficient to follow the usual rule that "A party entitled to recover on the breach of a contract should be allowed such damages as are the natural, direct and proximate result of the breach." (George v. Lane, 80 Kan. 94, 105 Pac. 15.)

As was said in Savings Bank v. A., T. & Santa Fe Rld. Co., 20 Kan. 519, 522:

"The custom of grain dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to a railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant, or consignee, against the shipment, and attaches his bill of lading to the draft. Upon the faith of the bill of lading, and without further inquiry, the bank cashes the draft. * * * A mode of business so beneficial to so many classes, ought to receive the favoring recognition of the law to aid its continuance; and the later decisions have gone very far to strengthen the quasi negotiability of bills of lading, independent of any statutory authority. * * * When issued, the parties issuing them (bills of lading) have the knowledge that they may and probably will be used with commission merchants, or at some bank, to obtain advances of money. In the most of cases, this result is almost certain to follow."

Again it was said in Weber v. Railway Co., 69 Kan. 611, 615, 77 Pac. 533:

"It is a well-known commercial usage for shippers to make drafts on their consignees with bills of lading attached and obtain the amounts drawn for at a bank before the receipt of the grain at its destination."

This usual and ordinary course of business thus known and recognized by shippers, carriers and consigners, affords sufficient information to the parties that a breach of the undertaking to deliver the goods in a reasonable time will result in such losses as may arise from depreciation in the market value of the commodity carried,
since that is the ordinary and natural result of the default
39 of the carrier. This is the measure of damages where there
is an unreasonable delay in the shipment of live stock. (Railway Co. v. Fry, 79 Kan. 21, 98 Pac. 205.)

In addition to the depreciation in market value, there was a recovery for the value of corn lost in transit, and an attorney's fee of $50.00 was therefore allowed to the plaintiff under the provisions of section 7107 of the General Statutes of 1909, and the stipulation "That if the plaintiff was entitled to recover attorney's fees, $50.00 would be a reasonable amount. The defendant objects to the fee on the ground that no demand in writing was made thirty days before suit, as required by the statute; and also upon the ground that the statute is inoperative as applied to interstate shipments since the congress has exercised its paramount authority over the subject in the enactment of the Hepburn law, especially in section 20, known as the Carmack amendment.

It was admitted at the trial "that demand was made by the plaintiff of the defendant on this claim December 23, 1910." This appears to obviate the first objection. While the statute requires the demand to be made upon the agent of the station at which the grain was shipped, the admission of a demand upon the company in the terms quoted is construed to admit that the demand was made of the proper agent.

The objections based upon federal regulation of interstate com-

merce remain to be considered. In an action under the statute before referred to it was held:

"The statute cited is a measure in exercise of the police power of the state, and does not assume to regulate commerce between the states. It is not, therefore, repugnant to the commerce clause of the federal constitution, and, being a police regulation, the provision contained in it allowing an attorney's fee for the successful prosecution of a case within its terms is constitutional." (Railway Co. v. Simonson, 64 Kan. 802, 68 Pac. 653.)

Before that decision this court had held in several cases that the statute allowing an attorney's fee in actions against railroad companies to recover damages from fire was valid. In one of these cases, Railroad Co. v. Matthews, 58 Kan. 447, 49 Pac. 602,
40 it was said that the imposition of an attorney's fee in such cases was in the nature of a police regulation, and within legislative power. That decision was affirmed in Atchison, Topeka etc. Railroad v. Matthews, 174 U. S. 96, citing and approving Gulf, Colorado & Santa Fe Railway v. Ellis, 165 U. S. 150. In the Ellis case a statute of Texas allowing an attorney's fee to plaintiffs in actions against railroad corporations on claims not exceeding $200.00 for personal services, overcharge, or lost or damaged freight or stock killed was held valid. In another action under the Texas statute the allowance of an attorney's fee was considered. The contention was that the statute was in conflict with the federal constitution and acts of Congress regulating commerce. It was said in the opinion:

"Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit.' So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle." (Missouri, Kansas & Texas Ry. v. Cade, 233 U. S. 642, 651, 652.)

In Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S. 412, the Texas statute was again examined in the light of the constitutional and statutory regulations of commerce and it was held not to be obnoxious to either. Reference was made to the fact that the act related only to the collection of claims not exceeding $200.00 and having a broad sweep which only incidentally includes claims arising out of interstate commerce it could not be held to be a burden upon it. The opinion quotes (p. 419) from one delivered by Justice Harlan in Reid v. Colorado, 187 U. S. 137, 148:

"It should never be held that Congress intends to super-
41 sede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'In the application of this principle of supremacy of an act of Congress in a case where

the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together."

While some points of difference between the Texas statute and the Kansas statute now under consideration are suggested, it is difficult to formulate any distinction in principle that would make the provision relating to an attorney's fee in one valid and the other invalid. True, claims to which the Texas statute applies are limited in amount, but it can not be that the imposition of an attorney's fee reasonably graduated to the amount of a claim is a burden on commerce where the claim is large and not a burden where it is small. The carrier has as good a right to resist payment, on the ground of injustice, of a claim under $200, as one over that amount. The Texas statute limits the fee to $20.00 evincing a legislative purpose to observe a just relation to the maximum amount that might be recovered. Under our statute the fee must be reasonable, and in administering the law courts will have a just regard to the amount—the payment of which is unjustly delayed for the prescribed statutory period after notice and demand. The Kansas statute relates only to the shipment of grain, seeds and hay. The Texas statute is broader and covers freight losses generally. This difference does not appear sufficient to make an allowance of an attorney's fee a burden upon interstate commerce in prosecutions for damages under one statute and not under the other. The provisions of our statute for an attorney's fee having been heretofore held valid by this court, and the principle being sanctioned by the controlling federal decisions cited, it follows that there was no error in the allowance made in this case.

The judgment is affirmed.

All the Justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

[Endorsed:] 19,051.

42 And afterwards on the 29th day of December, A. D. 1914, there was filed in the office of the clerk of the Supreme Court of the state of Kansas, a petition for a rehearing of this cause, which petition for a rehearing is in the words and figures, as follows, to-wit:

43 19051.

Filed Dec. 29, 1914. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 19051.

J. R. HAROLD, Appellee,
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

Appeal from Sedgwick County District Court.

Hon. Thornton W. Sargent, Judge.

Petition for Rehearing.

William R. Smith, Owen J. Wood, Alfred A. Scott, Attorneys for Appellant.

44 In the Supreme Court of the State of Kansas.

No. 19051.

J. R. HAROLD, Appellee,
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

Appeal from Sedgwick County District Court.

Hon. Thornton W. Sargent, Judge.

Petition for Rehearing.

Comes now The Atchison, Topeka and Santa Fe Railway Company, the above named appellant, and prays the court to grant a rehearing in this case upon the following grounds:

1. The affirmance of the judgment in this case was accomplished by setting state law above Federal law in a domain where the latter is supreme. We have recently observed a tendency in some state courts, whether arising from a feeling of jealousy or not we cannot say, to resent the extension of Federal law, rules and decisions into
45 the field of interstate commerce, to the exclusion of state law, doctrines and policies, which frequently results in the refusal of the state court to give effect to the Federal law where it conflicts with state law, doctrines or policies, even in cases where the supremacy of the Federal law is clear. Whether this decision is

one of the manifestations of that tendency we will not venture to say. But that such a policy or practice is fraught with injustice no one will deny. It is as much the duty of state courts to enforce rights sanctioned by Federal law as it is their duty to protect those which are created by state law. Litigants ought not to be compelled to resort to the United States Supreme Court for the enforcement of rights, privileges or exemptions granted by the Federal Constitution, or by the legislation of Congress enacted in pursuance thereof, but should be enabled to place full confidence in the willingness of their own State Courts to safeguard completely each jot and tittle of those rights.

We cannot assume that the Court overlooked the point made in our reply brief, that the shipment in question, being interstate, must be governed by Federal law, rules, doctrines and decisions, and that state laws, doctrines or policies must give place thereto. It is true that we did not argue this question at length, for we deemed
46 it too well settled to demand extended argument. The Federal rule in regard to the liability of a railway company to the assignee of a bill of lading is acknowledged by this Court, in the case of Railway Co. v. Hutchings, 78 Kan. 758, to be directly contrary to the rule adopted in this state. The doctrine of the Federal courts is that the "innocent" assignee of a bill of lading acquires no greater rights than his assignor. The rule is thus stated in Pollard v. Vinton, 105 U. S. 78:

"A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without endorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of the persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense.

It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and de-
47 liver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

Upon the proposition that this case must be governed by Federal law we contented ourselves with citing the case of Missouri, Kansas & Texas Ry. Co. v. Harriman, 227 U. S. 657. We knew that this court was familiar with those recent decisions of the Supreme Court of the United States commencing with Adams Express Co. v. Croninger, 226 U. S. 491, because they have been cited and followed by

the court in a number of its own recent decisions. We assumed that the court fully realized and appreciated the wide-spreading effects of those decisions, and that they cover the whole field of interstate transportation of freight, to the exclusion of state control thereover. However, for convenient reference, we will quote from Adams Express Co. v. Croninger, as to the meaning and effect of the Carmack Amendment:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject
48 and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

It manifestly follows from this that all the obligations incurred by a common carrier in the issuance of a bill of lading for an interstate shipment of freight is, as said in the Harriman case, "a Federal question to be determined under the general common law, and as such is withdrawn from the field of state law or legislation." We have shown what the Federal interpretation of the general common law is as to the liability of a common carrier to the assignee of a bill of lading, and that interpretation must govern in this case to the exclusion of all state interpretations of the common law in relation to the same subject. This conclusion, it seems to us, is axiomatic. Yet the court, intentionally or inadvertently, has utterly ignored this phase of the case, although its attention was called to the same in our briefs.

In Missouri Pacific Ry. Co. v. McFadden, 154 U. S. 155, 160, the Supreme Court of the United States held that "The liability
49 of a carrier begins when the goods are delivered to him or his proper servant authorized to receive them for carriage." Consequently the liability of appellant in this case commenced when it received the shipment in question from the Union Pacific Ry. Co. at North Topeka, and not before, and the evidence showed that after such receipt no default was made by it in the transportation thereof to destination.

At the oral argument Mr. Justice Porter made an illuminating suggestion which penetrated to the heart of the case, when he asked counsel for appellee whether the party to whom the exchange bill of lading was issued at Kansas City, to wit, the C. V. Fisher Grain Company, was deceived or misled by the misdating of the bill of lading, or was ignorant of the fact that the car of corn was not in the possession of the Railway Company at Kansas City at the time said bill was issued. Of course the facts were known to the Fisher

Grain Company, because the shipment was originally billed to Topeka, and that destination was shown in the original bill of lading taken up by the Grain Company and presented to the agent of the Santa Fe at Kansas City. Consequently, under the Federal rule, the plaintiff in this case, the assignee of said exchange bill of
50 lading, is charged with knowledge of all the facts known to the Fisher Grain Company, the assignor of said exchange bill of lading.

2. The court says in the opinion that the measure of damages for a breach of the undertaking to deliver the goods in a reasonable time is the depreciation in the market value of the commodity carried, but in this case, as we pointed out in our briefs, the court below allowed as damages the difference between the contract price of the commodity and the amount actually realized from the sale of it; our contention being that, if there was any liability on the part of the carrier, the measure of it was the difference in the market price (not the contract price) at destination between the time when the shipment should have arrived there and the time when it did arrive there. This point is also ignored by the court in its opinion, although properly raised by the appellant.

3. The court has wholly missed the point which we attempted to make with regard to the allowance of an attorney's fee. Our contention was and is simply this. The provision allowing an attorney's fee is part and parcel of a state statute regulating the transportation of grain by railroad companies, which statute, so far as inter-
51 state shipments are concerned, is of absolutely no force or effect. With regard to such shipments it is as though no such statute had ever been enacted. An allowance of attorney's fees is one of the penalties provided for the violation of that statute. If the statute fails with regard to interstate shipments, it follows as a matter of course that the penalty fails also. It would be paradoxical to hold that the penalty may be enforced when the statute cannot be. They must stand or fall together. The only statute in existence in the United States today regulating the interstate transportation of freight by railroad companies is the Carmack Amendment to the Hepburn Law, and that Amendment provides no penalties in the way of attorney's fees for a violation of its provisions, and therefore none can be collected.

It is futile for the court to cite as an authority today the decision in Railway Co. v. Simonson, holding that the statute in question was not repugnant to the commerce clause of the Federal Constitution. That decision was made in 1902, four years before the enactment of the Carmack Amendment upon which the decisions we rely on are based. It is conceded that previous to the passage of that law
52 the subject was within the control of state legislation, because Congress had not undertaken to exercise its jurisdiction thereover. But since Congress has spoken the situation has entirely changed, and the court must be aware that now the Kansas Act is absolutely null and void, so far as it attempts to invade the field now occupied by Federal legislation. No question is better settled than this by those recent decisions of the United States Supreme Court,

with which this court is thoroughly familiar. A case directly in point is St. Louis, Iron Mountain & S. Ry. Co. v. Edwards, 227 U. S. 265, where a statute of Arkansas, imposing penalties upon railroad companies for delay in giving notice to the consignee of the arrival of freight was in question, and it was held that the Hepburn Act not only "excludes the right of a state to regulate by penalties or demurrage charges the obligation of furnishing the means of interstate transportation, but also excludes power in a state to impose penalties as a means of compelling the performance of the duty to promptly deliver in consummation of such transportation." In C. R. I. & P. Ry. Co. v. Hardwick Elevator Co., 226 U. S. 426, the Supreme Court held that since the enactment of the Hepburn Act it is beyond
the power of a state to regulate the delivery of cars for inter-
53 state shipments, and declared void the reciprocal demurrage law of Minnesota. See also Southern Ry. Co. v. Reid, 222 U. S. 425. The Carmack Amendment is a portion of Section 20 of the Hepburn Act, and has reference specifically to the issuance of bills of lading, and the liability of the carrier thereunder. All of the foregoing cases were cited in our briefs, but seem to have made little or no impression upon the court. The other cases cited by the court involving the imposition of an attorney's fee are not controlling here, because the statutes there construed had no reference to the regulation or control of transportation, and therefore no feature of interstate commerce was brought in question. In G. C. & S. F. Ry. Co. v. Ellis, the statute allowing attorney's fees was held invalid, instead of valid, as stated by the court. The court in its opinion notes some points of difference between the Kansas statute and the Texas statute, which was upheld by the Supreme Court in the Cade case and in the Harris case, which, it states, "are suggested". By whom they were suggested is not disclosed; none of them were suggested by us. But the only point of difference which we did suggest,
and which is reiterated above, is not referred to at all by the
54 court. The difference between the two statutes stands out so clearly that he who runs may read. The Kansas statute is aimed at the regulation of the shipment of grain by railway companies. The Texas statute is designed, as said by the Supreme Court, to promote the prompt payment of small but well founded claims of a miscellaneous nature, among which are included claims for loss or damage to freight; but the statute does not undertake to regulate the transportation of freight, either state or interstate, and consequently it cannot be held to infringe upon the domain of the Hepburn Law. This distinction was clearly pointed out by the Supreme Court in the Harris case, where it was said that it (the Texas statute) "does not in anywise, either enlarge or limit the responsibility of the carrier for the loss of property entrusted to it in transportation, and only incidentally affects the remedy for enforcing that responsibility." The Kansas statute very greatly enlarges the responsibility of the carrier for the loss of property entrusted to it in transportation, by providing that the carrier shall issue a bill of lading which shall state the exact number of bushels, etc., of grain delivered to it, and

thereafter it shall be responsible to the consignee for the full
55 amount thereof, until it shall show that it has delivered the whole amount to the consignee, and that such bill of lading shall be conclusive proof of the amount of such grain so received by the railway company; and further provides that any railway company neglecting or refusing to give any person entitled thereto a bill of lading shall be liable to a fine of $100, and shall also be liable to the party injured for all damages sustained thereby, together with a reasonable attorney's fee, and that in all cases in which judgment shall be rendered against a railway company for loss or shortage on grain shipped, the court shall also render a judgment for a reasonable attorney's fee for the plaintiff's attorney, this latter provision being the one in controversy here. Does not this statute cover the same field of legislation as does the Carmack Amendment, except that the Kansas statute is limited to shipments of grain and kindred commodities, while the Federal Act covers all commodities?

We submit that these contentions are not trivial, but are deserving of serious consideration by this court, since they concern substantial
56 rights of the appellant, which we sincerely believe have been violated by the judgment complained of. Yet the court has not deigned to afford these questions even passing notice in its opinion. May we not indulge the hope that should the court deny us a rehearing, it will at least favor us with another opinion touching upon these points, answering our arguments thereon, and pointing out the errors therein? A further reason why we desire these points noticed is, that should we decide, in the event of final affirmance, to take the case to the United States Supreme Court, it will simplify matters considerably if the opinion of this Court shows affirmatively that the Federal questions were duly raised here.

Respectfully submitted,

WILLIAM R. SMITH,
OWEN J. WOOD,
ALFRED A. SCOTT,
Attorneys for Appellant.

57 Be it further remembered, that afterwards on the 11th. day of January, 1915, the same being one of the regular judicial days of the January term, 1915, of the supreme court of the state of Kansas, before said court, in session at the supreme court room in the city of Topeka, the following proceeding among others, was had and remains of record in the words and figures, as follows, to-wit:—

58–62 In the Supreme Court of the State of Kansas, Monday, January 11, 1915.

No. 19051.

J. R. HAROLD, Appellee,
v.
THE A., T. & S. F. R'L'Y Co., Appellant,

Journal Entry Denying Rehearing.

Now comes on for decision the petition for a rehearing of this cause; and thereupon it is ordered that said petition for a rehearing be denied.

* * * * * * *

63 In the Supreme Court of the State of Kansas.

19051.

J. R. HAROLD, Appellee,
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

Assignment of Errors.

Comes now The Atchison, Topeka and Santa Fe Railway Company, the above named appellant, and complains that in the record, proceedings and final order and judgment of the Supreme Court of the State of Kansas, in the above entitled cause, there is manifest error in this to-wit:

1. That the said Supreme Court of the State of Kansas erred in holding and deciding that the liability of a railway company towards the assignee of a bill-of-lading, issued for the transportation of freight in interstate commerce, in conformity with Federal Laws on the subject, is governed by the statutes of the State of Kansas and by the rules of the common law as construed, interpreted and adopted by the courts of that state.

2. That the said Supreme Court of the State of Kansas erred in refusing to hold and decide that the liability of a railway company to the assignee of a bill-of-lading issued for the transportation of freight in interstate commerce, is governed by Federal statutes and by the rules of the common law as construed, interpreted and adopted by the Federal Courts.

3. That the said Supreme Court of the State of Kansas erred in holding that the above named appellant was liable in damages to the said appellee as the assignee of a bill-of-lading, for failure to deliver at destination the shipment for which said bill-of-lading was
64 issued within a specified time after the date inserted in said bill-of-lading, notwithstanding the record showed that said

date was not the date on which said bill-of-lading was issued, and notwithstanding that the said shipment was not actually received by the said appellant until many days after the issuance of said bill-of-lading, and after the date inserted therein.

4. That the said Supreme Court of the State of Kansas erred in holding and deciding that the said appellant was absolutely bound by the statements in its said bill-of-lading in the hands of an assignee thereof, as to the date of the receipt of the goods mentioned therein, and was estopped from denying the receipt of the goods on the date stated in said bill-of-lading, or from showing that they were not actually received until long after said date.

5. That said Supreme Court erred in holding that the measure of damages for delay to said shipment was governed by the contract price thereof, notwithstanding the said Railway Company had no notice of any contract with reference to the sale of said grain.

6. That the said Supreme Court of the State of Kansas erred in holding and deciding that the provisions of Section 7107, General Statutes of Kansas 1909, being Section 10 of Chapter 100 of the Laws of Kansas 1893, entitled "An Act for the Protection of Shippers of Grain, Seeds and Hay", allowing an attorney's fee upon the prosecution of claims for damages against a railway company for shortage on shipments of grain, seed or hay, are not obnoxious to the Federal regulations of Interstate Commerce.

7. That the said Supreme Court of the State of Kansas, erred in holding and deciding that said Chapter 100 of the Laws of Kansas for 1893, or any part thereof, was of any force or effect as affecting the interstate shipment of freight by railroad companies.

8. That the said Supreme Court of the State of Kansas
65 erred in refusing to hold and decide that said Chapter 100 of the Laws of Kansas, 1893, was null and void as affecting the transportation of freight in interstate commerce.

9. That said Chapter 100 of the Laws of Kansas 1893, and especially that part thereof allowing attorney's fees for the plaintiff's attorney in judgments against a railway company for loss or shortage of grain, seed or hay, shipped, as construed by said Supreme Court of the State of Kansas as governing interstate shipments, is null and void as an attempt to regulate interstate commerce, and to impose an undue and unreasonable burden thereon.

10. That said Chapter 100 of the Laws of Kansas 1893, and especially that part thereof allowing an attorney's fee for the plaintiff's attorney in judgments against a railway company for loss or shortage of grain, seed or hay shipped, is unconstitutional and void, as being repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

11. That said Supreme Court erred in rendering judgment against the said appellant, affirming the judgment of the District Court of Sedgwick County, Kansas, rendered in favor of the said appellee and against the said appellant.

Wherefore, your petitioner prays that the judgment and decision of the said Supreme Court of the State of Kansas may be reversed,

set aside and held for naught, and that your petitioner may be restored to all things which it has lost by reason thereof.

WM. R. SMITH,
O. J. WOOD,
A. A. SCOTT,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company, Appellant.

66–73 [Endorsed:] No. 19051. In the Supreme Court of the State of Kansas. J. R. Harold vs. The A., T. & S. F. Ry. Co. Assignment of Errors. Filed Jan. 16 1915. D. A. Valentine, Clerk Supreme Court.

* * * * * * *

74 Filed Mar. 11, 1915. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the United States.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
J. R. HAROLD, Defendant in Error.

Stipulation.

It is hereby stipulated by and between the plaintiff in error and the defendant in error, that in addition to that part of the record designated by the plaintiff in error to be included in the transcript of record on its writ of error, there shall be included the counter abstract of record filed by the defendant in error herein, with his brief in the Supreme Court of Kansas, said counter abstract comprising about the first eleven lines included in his brief. And it is stipulated that the Clerk of the Supreme Court of Kansas may forward said counter abstract of defendant in error to the Clerk of the United States Supreme Court to be included in the transcript of record on writ of error.

ROBT. DUNLAP,
W. R. SMITH,
A. A. SCOTT,
Attorneys for Plaintiff in Error.
J. GRAHAM CAMPBELL,
RAY CAMPBELL,
Attorneys for Defendant in Error.

75 [Endorsed:] 19051. In the Supreme Court. J. R. Harold v. The A. T. & S. F. Ry. Co. Stipulation. 19051. A. T. & S. F. R'l'y Co. v. J. R. Harold. Stipulation to incorporate counter abstract of Record in transcript. Filed Mar. 11, 1915. D. A. Valentine, Clerk Supreme Court.

76 In the Supreme Court of the United States.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
J. R. HAROLD, Defendant in Error.

To the Clerk of the Supreme Court of Kansas:

The Atchison, Topeka & Santa Fe Railway Company, having filed its præcipe herein indicating as a part of the record to be incorporated into the transcript of the record on its writ of error herein, the abstract of the record which was before the Supreme Court of the State of Kansas, and it appearing that the Clerk of the lower court, in transmitting to the Federal Supreme Court the transcript of the record in this case, as designated by the plaintiff in error, did not include therein the counter abstract of J. R. Harold, comprising a part of the abstract of the record before the Supreme Court of Kansas, J. R. Harold, defendant in error, desires that his counter abstract of the record which was before the Supreme Court of the State of Kansas, comprising about eleven (11) lines included in the first part of his brief, be included in the abstract of the record designated by plaintiff in error, to be incorporated into the transcript of the record upon its writ of error.

J. G. CAMPBELL,
RAY CAMPBELL,
Attorneys for J. R. Harold, Defendant in Error.

The undersigned, attorneys for The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, hereby acknowledge service of a copy of the above statement and notice, this — day of February, 1915.

WILLIAM R. SMITH &
ALFRED A. SCOTT,
Attorneys for Plaintiff in Error.

77 [Endorsed:] 19051. J. R. Harold v. A. T. & S. F. R'l'y Co. Filed Mar. 1, 1915. D. A. Valentine, Clerk Supreme Court.

78 In the Supreme Court of the State of Kansas.

Be it further remembered, that on the 3rd day of November, 1914, there was filed in the office of the clerk of the supreme court of the state of Kansas, a counter-abstract of the record by the appellee, J. R. Harold, which counter abstract of the record is in the words and figures as follows, to-wit:—

79 Filed Nov. 13, 1914. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 19051.

J. R. HAROLD, Appellee,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant.

Appeal from District Court of Sedgwick County, Division Number Two.

Hon. Thornton W. Sargent, Judge.

Brief of Appellee.

J. Graham Campbell, Ray Campbell, Wichita, Kansas, Attorneys for Appellee.

80 In the Supreme Court of the State of Kansas.

No. 19051.

J. R. HAROLD, Appellee,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant.

Appeal from District Court of Sedgwick County, Division Number Two.

Hon. Thornton W. Sargent, Judge.

Counter Abstract of Appellee.

The appellee wishes to submit, in addition to that abstracted by the appellant, the following testimony:

In the deposition of O. L. Jackson, the witness was asked why he refused the car of corn tendered by defendant upon the bill of lading, and his answer was: "I bought the car at 63c. per bushel on a seven days' shipment, and the car did not arrive for about thirty days," etc. (R. 5).

81 And on cross examination, the same witness was asked as to his positive information as to the number of days the grain was in transit, and he answered: "The grain we bought was to be shipped in seven days, and we received the car thirty days afterwards." (R. 8.)

82 In the Supreme Court of the State of Kansas.

I, D. A. Valentine, clerk of the supreme court of the state of Kansas, do hereby certify that the above and foregoing are full true and correct copies of the Præcipe for completion of the record and the counter abstract of the record, filed by the appellee in the State supreme court of Kansas, in the case of J. R. Harold, appellee v. The A. T. & S. F. Ry. Co., appellant, as the same remain on file and of record in my office.

Witness my hand and the seal of the supreme court hereto affixed at my office in Topeka, this 1st day of March A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

83 [Endorsed:] 810/24554. A. T. & S. F. R'l'y Co., Pl'ff in Error, v. J. R. Harold, Def't in Error. Supplement to Transcript.

84 [Endorsed:] File No. 24,554. Supreme Court U. S., October term, 1914. Term No. 810. The Atchison, Topeka & Santa Fe Ry. Co., Pl'ff in Error, vs. J. R. Harold. Stipulation of counsel and addition to record. Filed March 13, 1915.

85 In the Supreme Court of the United States.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
v.
J. R. HAROLD, Defendant in Error.

To the Clerk of said Court:

The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, intends to rely on the errors set forth in the assignment of errors contained in the type written record.

Plaintiff in error thinks it is unnecessary to print any parts of the record herein except the abstract of the record which was before the Supreme Court of the State of Kansas, the opinion of the Supreme Court of the State of Kansas, the petition for a rehearing filed in the Supreme Court of the State of Kansas, and the assignments of error upon which the case is brought to this court, said parts of the record being sufficient for the consideration of the questions which plaintiff in error desires to present to the court.

ROBERT DUNLAP,
WILLIAM R. SMITH,
ALFRED A. SCOTT,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error.

The undersigned attorneys for J. R. Harold, defendant in error, hereby acknowledge service of a copy of the above statement and notice this 2nd day of February, 1915.

J. GRAHAM CAMPBELL,
RAY CAMPBELL,
Attorneys for Defendant in Error.

86 [Endorsed:] In the Supreme Court of the United States. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, vs. J. R. Harold, Defendant in Error. Designation of Parts of Record to be Printed. Robert Dunlap, William R. Smith, Alfred A. Scott, Attorneys for Plaintiff in Error.

87 [Endorsed:] File No. 24,554. Supreme Court U. S., October term, 1914. Term No. 810. Atchison, Topeka & Santa Fe Railway Company, Pl'ff in Error, vs. J. R. Harold. Specification of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed February 11th, 1915.

Endorsed on cover: File No. 24,554. Kansas Supreme Court. Term No. 347. The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, vs. J. R. Harold. Filed February 11th, 1915. File No. 24,554.

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In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 347.

The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error.

v.

J. R. Harold, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

ROBERT DUNLAP,
WILLIAM R. SMITH,
ALFRED A. SCOTT,
Attorneys for Plaintiff in Error.

GARDINER LATHROP,
Of Counsel.

HALL LITHO. CO. TOPEKA 19906

SUBJECT INDEX.

Alphabetical List of Cases Referred To.

In the
Supreme Court of the United States

OCTOBER TERM, 1915.

No. 347.

The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error.

v.

J. R. Harold, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the Supreme Court of Kansas for the purpose of having reviewed a judgment of that court affirming a judgment of the District Court of Sedgwick County, Kansas, against the Railway Company, plaintiff in error, for damages on account of alleged delay in the transportation of an interstate shipment of grain, and also loss of grain in transit.

This case involves two main propositions of law: (1) Whether the rights of an assignee of a bill of lading for an interstate shipment of freight shall be governed and determined by the State law or

by the Federal law; (2) Whether a certain statute of Kansas regulating shipments of grain, seed and hay by railroad and allowing an attorney's fee in the prosecution of claims for damages against a railway company for shortage on such shipments, is of any force or validity as applied to the interstate transportation of such commodities.

The facts of the case are substantially as follows:

The defendant in error, a grain dealer at Wichita, brought this action to recover damages from the Railway Company for failure to deliver in a reasonable time a carload of shelled corn at Elk Falls, Kansas, in accordance with a bill of lading issued by the Company at Kansas City, Missouri.

On September 14, 1910, the defendant in error sold to Shoe & Jackson a car of No. 3 shelled corn to be shipped to Elk Falls within seven days. Thereafter, he purchased car No. L. W. 33791 of bulk corn from the Nevling Elevator Company at Wichita, which endorsed to him a bill of lading issued by the Railway Company, dated September 21, 1910, reciting the receipt of the corn on that day at Kansas City, Missouri, from C. V. Fisher Grain Co., consigned to order of the shipper at Elk Falls, "Notify Nevling Elevator Company." The defendant in error paid a draft attached to the bill.

The corn did not arrive at Elk Falls until October 9, and because of the delay was not accepted by Shoe & Jackson. The sale had been made at 63 cents per bushel, which defendant in error would have received had the shipment been delivered at Elk Falls within seven days after September 14th, or not later than September 21st. By reason of a decline in the market it was worth only 55 cents per bushel on arrival, and was sold by the plaintiff at that price. There was also a claimed shortage of 2000 pounds in the weight of the corn delivered as compared with the amount recited in the bill of lading, on account of which a refund of freight charges on the 2000 pounds was demanded.

It appears that the shipment described in the bill of lading originated at Yanka, Nebraska, on the Union Pacific Railway and was billed in car L. W. 33791 by James Bell & Son to shipper's order, Topeka, notify C. V. Fisher Grain Co., care of Santa Fe, for shipment. The bill was dated at Yanka, September 21st and was endorsed by Bell & Son to the Fisher Grain Company. That Company paid the shipper's draft, took the bill of lading to the defendant's agent at Kansas City and received in exchange the bill of lading first referred to, on the 24th day of September instead of the 21st day of

September, the date named in the instrument. The car arrived in Topeka on September 28th, and was set by the Union Pacific Company to the Atchison, Topeka & Santa Fe Railway Company, but on September 30 it was set back to the Union Pacific Company because the car was in bad condition. The Union Pacific Company then sent it to an elevator, where the corn was transferred to another car, and on October 6 was set to the Atchison, Topeka & Santa Fe Railway Company, and by that Company was moved to Elk Falls. It was never at Kansas City.

While the defendant in error alleged in his petition, and the evidence discloses, that his contract of sale required that the carload of corn should be delivered at Elk Falls not later than September 21st, 1910, yet his complaint against the Railway Company is based upon its failure to deliver the corn at Elk Falls within a reasonable time after September 21st, 1910, which is the date borne by the bill of lading in controversy. (T. R. 2, 3, 6.)

The bill of lading which the defendant in error purchased and which was assigned to him is set out in full opposite page 4 of the Transcript of Record.

The trial court rendered judgment in favor of

the defendant in error and against the plaintiff in error for the sum of $165.80 as prayed for, with interest thereon from the 1st day of October, 1910, to the 27th day of August, 1913, amounting to $29.00 and also for an attorney's fee of $50.00. (T. R. 11.)

The allowance of an attorney's fee was made by virtue of Sec. 7170 of the General Statutes of Kansas 1909, being Sec. 10 of Ch. 100 of the Laws of Kansas 1893, entitled "An Act for the protection of shippers of grain, seeds and hay." The sections of said act which are pertinent to this case are quoted below:

"Sec. 6. Each railway company, operating a railway wholly or partly within the State, shall be required to give to any person delivering grain, seed or hay in bulk or in sacks to such company, for transportation, at any station entitled to track scales under this act, a bill of lading, in duplicate, which bill of lading shall state the exact number of bushels or pounds of grain, seed or hay, so delivered to such railway company, by whom delivered and to whom consigned; and thereafter such railway company shall be responsible to the consignee named in said bill of lading, or to his heirs or assigns, for the full amount of such grain, seed or hay so delivered to such railway company, until it shall show that it has delivered the whole amount of such grain, seed or hay to such consignee or to his heirs or assigns: *Provided, however,* That if the shortage on any car of grain, seed or hay shall not exceed one-fourth of one per cent. of the

amount of grain, seed or hay put in the car, then the railway company shall be deemed to have delivered the whole amount of grain, seed or hay in the car. And in any action hereafter brought against any railway company, for or on account of any failure or neglect to deliver any such grain, seed or hay to the consignee, or his heirs or assigns, either duplicate of such bill of lading shall be conclusive proof of the amount of such grain, seed or hay so received by such railway company.

"Sec. 7. No defense to an action for the recovery of such loss or shortage on grain, seeds or hay so weighed, by reason of the same having occurred on the line of some other company, to which it may have been transferred or which may have received it for shipment, shall be admitted to be made unless all the facts and circumstances of such loss or shortage so occurring on such other line shall be fully set forth in written pleadings filed by the shipping company, and affirmatively and fully proved by it.

"Sec. 8. Any railway company failing, neglecting or refusing to provide and maintain track scales, as required by section 1 of this act, shall state, in its bills of lading given for grain or seed delivered to it for transportation at any station or town entitled to track scales under the provisions of this act, the number of bushels or pounds of such grain, seed or hay, and as stated by the person or persons delivering such grain, seed or hay to such railway company, and the amount so stated shall be conclusive and binding upon such railway company, as provided in section 6 of this act: *Provided, however,* That the person so delivering such grain, seed or hay to such railway company shall, if required by the railway company, make an affidavit that the amount of such grain, seed or hay as stated by him is true and correct.

"Sec. 10. Any railway company neglecting or refusing to give any person entitled thereto a bill of lading, as required by either Sections 6 or 8 of this act, shall be liable to a fine of one hundred dollars ($100) for each and every refusal, to be recovered in an action brought in the name of the State, in any court of competent jurisdiction, and shall also be liable to the party injured by such refusal for all damages sustained thereby, together with a reasonable attorney's fee to be recovered by an action in any court of competent jurisdiction; and in all cases in which judgment shall be rendered against a railway company for loss or shortage on grain, seed or hay shipped, the magistrate or court shall also render judgment for a reasonable attorney's fee for the plaintiff's attorney: *Provided,* That such attorney's fee shall not be allowed unless written demand be made upon the agent of the station at which grain was shipped for payment of such loss or shortage thirty (30) days before the beginning of such suit."

The other sections of the act relate to the furnishing by railway companies of track scales for the weighing of grain in carload lots.

The Supreme Court of Kansas held, as shown by the syllabus (T. R. 13):

"1. The rule which invests the innocent holder of a bill of lading with rights not available to the shipper, declared in *Savings Bank v. A. T. & Santa Fe Rld. Co.,* 20 Kan. 519; *Railway Co. v. Hutchings,* 78 Kan. 758, 99 Pac. 230; and *Hutchings v. Railway Co.,* 84 Kan. 479, 114 Pac. 1079; is followed in a case where the plaintiff purchased corn described in a bill of lading, and paid the shipper's draft attached to the bill in the usual course of business.

"2. The provisions of Section 7107 of the General Statutes of 1909, allowing an attorney's fee upon the prosecution of claims for damages against a railway company for shortage on shipments of grain, seed, or hay, are not obnoxious to the federal regulations of interstate commerce."

The judgment of the trial court was affirmed. (T. R. 18.)

SPECIFICATION OF ERRORS.

The Supreme Court of Kansas erred:

1. In holding and deciding that the liability of a railway company towards the assignee of a bill of lading issued for the transportation of freight in interstate commerce, in conformity with Federal laws on the subject, is governed by the statutes of the State of Kansas and by the rules of the common law as construed, interpreted and adopted by the courts of that State, and not by the Federal statutes and the rules of the common law as construed, interpreted and adopted by the Federal courts.

2. In holding that the plaintiff in error was liable in damages to the defendant in error as the assignee of a bill of lading, for failure to deliver at destination the shipment for which said bill of lading was issued within a specified time after the

date inserted in said bill of lading, notwithstanding the record shows that said date was not the date on which said bill of lading was issued, and notwithstanding that the said shipment was not actually received by the said plaintiff in error until many days after the issuance of said bill of lading and after the date inserted therein.

3. In holding and deciding that the plaintiff in error was absolutely bound by the statements and recitals in its said bill of lading in the hands of an assignee thereof, as to the date of the receipt of the goods mentioned therein, and was estopped from denying the receipt of the goods on the date stated in said bill of lading, or from showing that they were not actually received until long after said date.

4. In holding that the measure of damages for delay to said shipment was governed by the contract price thereof, notwithstanding the plaintiff in error had no notice of any contract with reference to the sale of said grain.

5. In holding and deciding that the provisions of Sec. 7107, General Statutes of Kansas 1909, being Sec. 10 of Ch. 100 of the Laws of Kansas 1893, entitled "An Act for the protection of shippers of grain, seeds and hay", allowing an attorney's fee

upon the prosecution of claims for damages against a railway company for shortage on shipments of grain, seed or hay, are not obnoxious to the Federal regulations of interstate commerce.

6. In holding and deciding that said Chap. 100 of the Laws of Kansas 1893, or any part thereof, was of any force or validity as affecting the interstate shipment of freight by railroad companies, and in refusing to hold and decide that the same was null and void as affecting interstate commerce.

ARGUMENT.

I.

THE SHIPMENT BEING INTERSTATE, THE MEANING AND EFFECT OF THE BILL OF LADING AND THE RIGHTS OF AN ASSIGNEE THEREUNDER, MUST BE INTERPRETED AND DETERMINED BY FEDERAL LAW, RULES AND DECISIONS, AND NOT BY THE LAWS, RULES, DECISIONS OR POLICIES OF THE STATE OF KANSAS. UNDER THE FEDERAL RULE THE PLAINTIFF IN ERROR WAS NOT BOUND BY THE RECITALS IN THE BILL OF LADING, BUT COULD SHOW THE ACTUAL FACTS AS TO THE RECEIPT OF THE GOODS.

It is to be observed that when the exchange bill of lading, which afterwards came into the hands of

the defendant in error by assignment, was issued to the C. V. Fisher Grain Company at Kansas City by the plaintiff in error on September 24, 1910 (although erroneously dated September 21, 1910), the car mentioned therein was on the line of the Union Pacific Railroad, and was not received by the plaintiff in error until October 6, 1910, at North Topeka, Kansas, after which it was delivered at Elk Falls, Kansas, its destination, on October 9, 1910, thus being only three days in transit over the Santa Fe line between the points named, which the evidence does not show to be an unreasonable length of time for such a journey. Whatever delay the car sustained occurred while it was in the possession of the Union Pacific Railroad Company, and the greater part of that was occasioned by having to transfer the contents to another car on account of the original car being found to be in bad order at North Topeka. This condition is not chargeable to the plaintiff in error, as it existed before that Company received the car. Not being the initial carrier, this defendant could be held liable only for the delay occurring on its own line, under the express terms of the bill of lading as contained in section two of the conditions on the back thereof.

But the Supreme Court of Kansas held that the Railway Company was estopped from denying the receipt of the car at Kansas City on the date named in the bill of lading, to wit, September 21, 1910, and held it liable for failure to deliver the same at Elk Falls within the time required by the defendant in error's contract of sale.

The evidence showed that on September 14, 1910, Harold, the defendant in error, contracted with Shoe & Jackson to sell them a carload of corn on seven days' delivery. (T. R. 6.) This required that the grain should be at Elk Falls not later than September 21st. Consequently, on the very day that the corn was to be delivered to the purchaser under the terms of the contract, the car in question had just been delivered to the Union Pacific Railroad at Yanka, Nebraska, for transportation, the original bill of lading issued by that Company being dated September 21st. (Exhibit "B" T. R. 9.) It was three days thereafter, or on September 24th, when the exchange bill of lading was issued by the plaintiff in error at Kansas City to the Fisher Grain Company, and it was not until October 6th, or fifteen days after the time limit of the contract of purchase had expired, that the plaintiff in error actually received the corn for transportation.

The record is silent as to the date when Harold, the defendant in error, received the bill of lading which he purchased from the Nevling Grain Company at Wichita, but as it was not issued at Kansas City until September 24th and had to be forwarded to the defendant in error at Wichita, it is apparent that it did not come into his possession until several days after the time limit of his contract of sale had expired. It was contended by defendant in error, and assumed as a fact by the Supreme Court of Kansas, that if the corn had been delivered at Elk Falls within a reasonable time after September 21st, the date inserted in the bill of lading, the defendant in error's contract of sale would have been fulfilled and the corn would have been accepted by the purchaser at the contract price. But there is nothing in the record to substantiate this claim. The contract was to deliver the corn at Elk Falls within seven days after September 14th, and that time limit had expired when the defendant in error received and accepted the bill of lading from the Nevling Grain Company, from whom he purchased it. How can it be said, therefore, that he relied on the recitals in the bill of lading for the fulfillment of a contract which had already expired when he accepted the bill? If

he did rely on them, by what right did he do so? It was therefore manifestly unjust to hold the defendant in error liable for the failure to transport the car within a period which had already elapsed before it issued its bill of lading or obtained possession of the car, and also before such bill of lading had been purchased by the defendant in error.

It has long been the doctrine in Kansas that a common carrier is estopped from denying the receipt of goods named in a bill of lading issued by it, in the hands of an innocent purchaser.

Savings Bank v. A. T. & S. F. Rld. Co., 20 Kan. 519.

Railway Co. v. Hutchings, 78 Kan. 758.

Hutchings v. Railway Co., 84 Kan. 749.

Those were cases where the carrier never received the goods for which the bill of lading was issued, and it was held liable for the value of the goods to the purchaser and assignee of the bill of lading who accepted it in good faith as representing the property named therein.

But the case at bar is the first case in which the Kansas Supreme Court, or any court so far as we know, has ever held that the carrier is bound by the date of issue inserted in a bill of lading, to the

extent of making it absolutely liable for failure to deliver the goods at destination within a reasonable time after such date, and denying it the right to show that such date is erroneous as indicating the time of receipt of the goods, or to show that the same were not received until long afterwards, or to offer any legitimate excuse whatever for the alleged delay in delivery.

At common law the duty of a carrier is to transport and deliver within a reasonable time, but this is not an absolute duty, and the carrier is permitted to escape liability by showing that the delay was caused by accident or misfortune, and that he exercised due care and diligence to guard against the delay.

2 Hutch. Carr. 3rd Ed., p. 721.

The bill of lading in question here expressly provides, in the third section of the conditions on the back thereof, that no carrier is bound to transport the property in time for any particular market or otherwise than with reasonable dispatch unless by specific agreement indorsed thereon. Moreover, it has been held to be an unlawful discrimination for an interstate carrier to agree with a particular shipper to expedite a shipment at regular rates when no rate has been published for special expe-

diting, and relief on such a contract will be denied.

Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155.

Thus it will be seen that the decision of the Supreme Court of Kansas imposed upon the Railway Company the absolute obligation to deliver the shipment at destination within a definite time at all hazards and regardless of any legal excuse it might have for delay, in contravention of the carrier's common law duty, its contract of carriage, and the inhibition of the Interstate Commerce Law. To impose such a duty upon the plaintiff in error towards the defendant in error in this case would be to afford him a special service not granted or offered to other shippers paying the same rates, constituting the species of discrimination which was condemned by this Court in the case last cited.

It is acknowledged by the Supreme Court of the State of Kansas that the doctrine of the Federal courts in regard to the liability of a common carrier to the assignee of a bill of lading, is diametrically opposed to its own doctrine on that subject. (*Railway Co. v. Hutchings*, 78 Kan. 758.)

The rule adopted by this Court is that the "innocent" assignee of a bill of lading acquires no

greater rights than his assignor. In *Pollard v. Vinton,* 105 U. S. 78, it is said:

"A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without endorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of the persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

"It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

See also:

Shaw v. Railroad Co., 101 U. S. 557.

Friedlander v. Texas, etc., Ry. Co., 130 U. S. 416.

Iron Mountain Railway v. Knight, 122 U. S. 79.

In *Missouri Pacific Railway Company v. McFadden*, 154 U. S. 155, it was held (Syl.):

"If a railroad company, for its own convenience and the convenience of its customers, is in the habit of issuing bills of lading for cotton delivered to a compress company, to be compressed before actual delivery to the railroad company, with no intention on the part of the shipper or of the carrier that the liability of the carrier shall attach before delivery on its cars, and the cotton is destroyed by fire while in the hands of the compress company, the railroad company is not liable for the value of the cotton so destroyed to an assignee of the bill of lading without notice of the agreement and course of dealing between the shipper and the carrier."

On page 160 of the opinion the court said:

"The case presents the simple question of whether a carrier is liable on a bill of lading for property which at the time of the signing of the bill remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry. This rule is thus stated in the text-books: 'The liability of a carrier begins when the goods are delivered to him or his proper servant authorized to receive them for carriage.' (Redfield on Carriers, 80.) 'The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing

to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other; and until it has become imposed upon the carrier by a delivery and acceptance he cannot be held responsible for them.' (Hutchinson on Carriers, 82) . . .

"Whilst the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill."

As shown above, the rule in the Federal courts was tersely expressed in *Pollard v. Vinton*, 105 U. S. 8, as follows:

"The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received there can be no valid contract to carry or to deliver."

So, also, until the goods are received for carriage no valid contract can be entered into. It must always be open to the carrier, therefore, to show just when its undertaking did attach.

That is also the rule plainly recognized in the Carmack Amendment, which provides that "any common carrier . . . *receiving property for transportation* . . . shall issue a receipt or bill

of lading therefor, and shall be liable to the lawful *holder* thereof for any loss", etc.

The obligation to issue the bill of lading does not attach until the goods are received. That provision negatives the idea that a bill of lading might be lawfully issued unless and until the property is received for transportation. In order that there may be uniformity in the administration of this provision of the Carmack Amendment governing the issuance of bills of lading, it is quite evident that such an instrument can be subject only to the rulings of the Federal courts. Otherwise we would find that in the courts of one State a shipper or holder would be given an advantage in respect to interstate bills of lading, while in the courts of some other State or jurisdiction, under a similar bill of lading, the shipper or holder would be denied any such advantage.

The exchange bill of lading was issued at Kansas City in the ordinary course of business, and at the request and for the convenience of the Fisher Grain Company, which wished to divert the shipment from Topeka, Kansas, its original destination, to Elk Falls, Kansas, its final destination, it having sold the corn while it was in course of transportation, and the purchaser desiring it de-

livered at the latter place. When the Fisher Grain Company received this bill of lading it of course knew that the car of corn therein described was not at Kansas City, and that it was not intended to be there, but, on the contrary, knew that it was in the possession of the Union Pacific Railroad Company in transit from Yanka, Nebraska, to Topeka, Kansas, and that under the diversion order which said Fisher Grain Company had given to the plaintiff in error the car would be delivered to that Company at Topeka, Kansas, for carriage and delivery at Elk Falls, its new destination. Thus the Fisher Grain Company was in no manner deceived as to the true situation, but was fully cognizant as to all the facts connected with the transaction, and under the foregoing authorities its assignee, the defendant in error, was charged with knowledge of all the facts known to his assignor.

That the Federal rule as to the rights of an assignee of a bill of lading must control this case appears to admit of no doubt, in view of the decisions of this Court in *Adams Express Co. v. Croninger,* 226 U. S. 491; *Mo. Kans. & Tex. Ry. v. Harriman,* 227 U. S. 657, and other cases of like import decided by this Court within the past few years, interpreting the meaning, scope and effect

of the Carmack Amendment to the Interstate Commerce Law.

In the Croninger case it was said, page 505, 506:

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. . . . The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon State regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

In the Harriman case it was said, on pages 671, 672:

"It is conceded that there are statutes in Missouri, the State of the making of the contract, and the State in which the loss and damage occurred, and in Texas, the State of the forum, which declare contracts invalid which require the bringing of an action for a carrier's liability in less than

the statutory period, and that this action, though started after the lapse of the time fixed by the contract, was brought within the statutory period of both States.

"The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question to be determined under the general common law, and as such is withdrawn from the field of state law or legislation."

Following these decisions the Supreme Court of Mississippi has held in *St. Louis & S. F. Ry. Co. v. Woodruff Mills*, 62 So. 171, and *Southern Ry. Co. v. Northern States Cotton Co.*, 64 So. 965, that a statute of that State making bills of lading conclusive in the hands of *bona fide* holders for value against the person or corporation issuing them, that the property described therein was received by the carrier, was abrogated, so far as interstate shipments are concerned, by the Carmack Amendment.

We therefore maintain that the liability of the plaintiff in error did not commence until the car of corn was received by it on October 6th at North Topeka, and the record does not show that any

delay occurred in the transportation and delivery of it after such receipt. The Supreme Court of Kansas erred in holding the plaintiff in error bound by the date or other recitals in the bill of lading and estopped from showing a state of facts inconsistent therewith.

This disposes of the first three specifications of error.

II.

The Measure of Damages Allowed by the Trial Court and Approved by the Supreme Court of Kansas was Erroneous.

The defendant in error was permitted to recover as damages the difference between the price at which the purchaser had contracted to buy the corn from him, provided delivery was made not later than September 21, 1910, and the price the defendant in error was able to obtain for it on the open market after it arrived at destination.

The plaintiff in error was not a party to this contract and had no knowledge of its existence at the time it issued the bill of lading in question to the Fisher Grain Company at Kansas City. The special damages claimed and allowed can in

no sense be said to have been reasonably within the contemplation of the Railway Company and the shipper at the time the contract of transportation was made, as the probable result of its breach, and therefore are not recoverable.

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 544, 545.

3 Hutch. Carr. 3rd ed. Sec. 1367.

In fact, the Railway Company did not know Harold in the transaction at all, its dealings being solely with the Fisher Grain Company as shipper, and the Nevling Elevator Company as the party to be notified upon the arrival of the shipment at Elk Falls.

As is well known, the true measure of damages for delay to a shipment, in the absence of a special contract, is the depreciation in the market value, if any, between the time when it should have been delivered and the time when it was delivered.

3 Hutch. Carr. 3rd Ed., Sec. 1356.

This, therefore, is the only rule that could have been applied in the present case had the defendant Railway Company been responsible for the delay. But, as heretofore shown, there was no unreasonable delay on the part of the plaintiff in error in the transportation of the corn after it

reached its line or while in its possession. Neither was there any proof offered as to the depreciation in the market value of the corn between the time the shipment should have reached Elk Falls and the time when it did arrive there.

III.

THE ALLOWANCE OF AN ATTORNEY'S FEE FOR THE DEFENDANT IN ERROR'S ATTORNEY WAS UNLAWFUL BECAUSE THE STATUTE OF KANSAS, AUTHORIZING SUCH FEE, IS A NULLITY AS AFFECTING AN INTERSTATE SHIPMENT OF FREIGHT.

Chapter 100 of the Laws of Kansas 1893, by virtue of Section 10 of which an attorney's fee was allowed to the defendant in error's attorney for the prosecution of this action, is entitled "An Act for the protection of shippers of grain, seed and hay."

Section 6 of said act provides that each railway company operating a railway wholly or partly within the State, shall be required to give to any person delivering grain, seed or hay in bulk or in sacks to such company for transportation at any station entitled to track scales under said act, a bill of lading in duplicate, which shall state the

exact number of bushels or pounds of grain, seed or hay so delivered to such company, by whom delivered and to whom consigned, and thereafter such railway company shall be responsible to the consignee named in said bill of lading for the full amount of such grain, seed or hay so delivered, until it shall show that it has delivered the whole amount to such consignee, except, however, a shortage of not exceeding one-fourth of one per cent., and in any action brought against a railway company for failure to so deliver, either duplicate of such bill of lading shall be conclusive proof of the amount of such grain, seed or hay so received by the railway company.

Section 7 provides that no defense to an action for the recovery of such loss or shortage by reason of its having occurred on the line of some other company, shall be admitted to be made unless all the facts and circumstances of such loss or shortage so occurring on the other line shall be fully set forth in written pleadings filed by the shipping company and affirmatively and fully proved by it.

Section 10 provides that any railway company neglecting or refusing to give any person entitled thereto a bill of lading as required by either Sec-

tion 6 or Section 8 of the act shall be liable to a fine of $100 for each and every refusal, to be recovered in an action brought in the name of the State, and shall also be liable to the party injured by such refusal for all damages sustained thereby, together with a reasonable attorney's fee; and in all cases in which judgment shall be rendered against a railway company for loss or shortage of grain, seed or hay shipped, the magistrate or court shall also render judgment for a reasonable attorney's fee for the plaintiff's attorney.

The latter provision is the one under which the attorney's fee was allowed in this case.

It must be apparent upon the most casual consideration that this act, so far as it concerns the subject of the issuance of bills of lading by a common carrier, embraces substantially the same field of legislation as does the Carmack Amendment, except that the Kansas statute is limited in its operation to shipments of grain, seed and hay, while the Federal act includes all shipments. The Kansas statute requires that the carrier shall issue a bill of lading, which shall be conclusive proof as to the quantity of grain, seed or hay delivered to it, shall be responsible for the delivery to the consignee of the full amount thereof, and in an

action against it for any loss, shall not be permitted to defend upon the ground that such loss occurred on the line of some other carrier until all the facts showing such loss on the connecting line be fully pleaded and proved. The Carmack Amendment requires a common carrier to issue a receipt or bill of lading for property received for transportation, and makes such carrier liable to the holder thereof for any loss, damage or injury occurring on its own line or connecting line.

The primary purposes of the Kansas statute are to regulate the shipment and transportation of grain, seed and hay, to require the carrier to issue bills of lading for such shipments, and to prescribe the carrier's liability thereunder. The allowance of an attorney's fee is one of the penalties provided for a violation of the act, and is only incidental to the main purposes of the statute. It is part and parcel of a State statute which, so far as interstate shipments are concerned, is of absolutely no force or effect. With regard to such shipments it is as though no such statute had ever been enacted. If the statute fails with regard to interstate shipments it follows, as a matter of course, that the penalty, being an integral part of such statute, must fail also. It would be paradox-

ical to hold that the penalty may be enforced when the mandates of the statute, for a violation of which the penalty is imposed, cannot be. All the parts of the statute must stand or fall together. The only statute in force in the United States at the time of the shipment in question fixing the liability of railroad companies in the transportation of interstate freight, was the Carmack Amendment to the Interstate Commerce law, and neither that amendment nor any other part of the Comm[illegible]rce Act provides penalties in the way of attorney's fees for loss, damage or injury to property in course of transportation, and consequently none may be lawfully assessed or collected.

These views were strongly urged before the Supreme Court of Kansas and were fully discussed in our briefs, oral argument, and petition for rehearing in that court, but, notwithstanding, the court held that "The statute cited is a measure in exercise of the police power of the State, and does not assume to regulate commerce between the States. It is not, therefore, repugnant to the commerce clause of the Federal Constitution, and, being a police regulation, the provision contained in it allowing an attorney's fee for the successful prosecution of a case within its terms is constitu-

tional," citing *Railway Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653 (which was a case decided before the enactment of the Carmack Amendment.) (T. R. 17.)

The court then cites *Atchison, Topeka, etc., Rld. Co. v. Matthews*, 174 U. S. 96, and *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, and states that in the Ellis case a statute of Texas allowing an attorney's fee to plaintiffs in actions against railroad corporations on claims not exceeding $200.00 for personal services, overcharges, or lost or damaged freight, or stock killed, was held *valid*, when as a matter of fact directly the opposite holding was made in that case, it being held that this statute was unconstitutional as constituting class legislation.

The court then proceeds to consider the case of *Mo. Kan. & Tex. Ry. v. Cade*, 233 U. S. 642, and *Mo. Kan. & Tex. Ry. Co. v. Harris*, 234 U. S. 412, construing a Texas statute allowing an attorney's fee to plaintiffs in actions against persons or corporations for personal services, or for labor performed, or for material furnished, or for overcharges in freight or express, or for any claim for lost or damaged freight, or for stock killed or injured, in cases where the amount of such claims

shall not exceed $200.00. In the Cade case it was held that this statute is "a police regulation designed to promote the payment of small claims and to discourage unnecessary litigation in respect to them," that it is not repugnant to either the "equal protection" or the "due process" clauses of the Fourteenth Amendment, and that so far as the attack was founded upon the Commerce Clause and the Act to Regulate Commerce, the Court deemed it sufficient to say that the judgment under review was not based upon a claim arising out of interstate commerce, and hence the plaintiff in error did not bring itself within the class with regard to whom it claimed the act to be in this respect repugnant to the Constitution and laws of the United States.

In the Harris case the Cade case was followed, to the effect that the statute in question was a police regulation designed to promote the payment of small but well founded claims and to discourage unnecessary litigation in respect to them. In distinguishing it from other statutes which had been held to be in conflict with the Carmack Amendment, and after reaffirming the doctrine that the special regulations and policies of particular States upon the subject of the carrier's liability for loss

or damage to interstate shipments and the contracts of carriers with respect thereto have been superseded by said Amendment, this Court said (234 U. S. 420):

"But the Texas statute now under consideration does not in anywise either enlarge or limit the responsibility of the carrier for the loss of property entrusted to it in transportation and only incidentally affects the remedy for enforcing that responsibility."

The distinction here made was referred to in the case of *Charleston & Car. R. R. v. Varnville Co.*, 237 U. S. 597, where a statute of South Carolina imposing a penalty on carriers for failure to settle or adjust claims within forty days was held to be an unjust burden on interstate commerce and in conflict with the provisions of the Carmack Amendment. Referring to the Harris case MR. JUSTICE HOLMES said, pages 603, 604:

"It is true that in that case the inclusion of the attorney's fee not exceeding $20 in the costs upon judgments for certain small claims was upheld, although incidentally including some claims arising out of interstate commerce. But apart from the effect being only incidental, the ground relied upon was that the statute did not 'in anywise enlarge . . . the responsibility of the carrier' for loss or 'at all affect the ground of recovery, or the measure of recovery,' pp. 420, 422. The South Carolina Act, on the other hand, extends the

liability to losses on other roads in other jurisdictions and increases it by a fine difficult to escape. It overlaps the Federal act in respect of the subjects, the grounds, and the extent of liability for loss. . . .

"It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a State policy differently conceived; and the fine of $50 is enough to constitute a burden. *Southern Ry. v. Reid,* 222 U. S. 424, 443. But that is immaterial. When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a State law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. (*Chicago, Rock Island & Pacific Ry. v. Hardwick Elevator Co.,* 226 U. S. 426, 435. *Southern Railway v. Indiana Railroad Commission,* 236 U. S. 439, 446, 447.) The legislation is not saved by calling it an exercise of the police power, or by the proviso in the Carmack Amendment saving the rights of holders of bills of lading under existing law. (*Adams Express Co. v. Croninger,* 226 U. S. 491, 506, 507.)"

The distinction between the Texas statute and the Kansas statute is thus made clear. The Texas statute does not undertake to regulate the transportation of freight, either State or interstate, nor in anywise either to enlarge or limit the responsibility of the carrier for the loss of the property entrusted to it in transportation, and only incidentally affects the remedy for enforcing that responsibility. The Kansas statute, on the other

hand, is aimed at the regulation of the shipment of grain, seed and hay by railroads. It very greatly enlarges the responsibility of the carrier for the loss of property entrusted to it in transportation by the provisions of Sections 6, 7, 8 and 10, to which we have heretofore called specific attention. It overlaps the Federal act in respect of the subjects, the grounds, and the extent of liability for loss. It was not contrived in aid of the policy of Congress, but to enforce a State policy differently conceived, and the penalty of an attorney's fee is enough to constitute a burden.

In *St. Louis Iron Mntn. & S. Ry. Co. v. Edwards*, 227 U. S. 265, where a statute of Arkansas imposing penalties upon railroad companies for delay in giving notice to the consignee of the arrival of freight, was in question, it was held that the Hepburn Act not only "excludes the right of a state to regulate by penalties for demurrage charges the obligation of furnishing the means of interstate transportation, but also excludes power in a state to impose penalties as a means of compelling the performance of a duty to promptly deliver in consummation of such transportation."

The ruling in *Blalock Hardware Co. v. Seaboard Air Line*, 86 S. E. Rep. 1026, (par. 6 Syllabus) is directly in point.

See also:

Chi. R. I., etc., Ry. Co. v. Hardwick Elevator Co., 226 U. S. 426.

Southern Ry. v. Reid, 222 U. S. 425.

Incidentally it may be remarked that in addition to its being in conflict with the Interstate Commerce law, the Kansas statute by its terms evidently was not intended to apply to a shipment originating outside of the State, because Sections 1 to 5 of the act require railway companies to provide and maintain track scales for the weighing of grain in carload lots at certain stations from which a prescribed amount of shipping shall be done, and Section 6 provides that the railway company shall give to any person delivering grain, seed or hay to such company for transportation at any station entitled to track scales under the act, a bill of lading, etc. The requirements of the statute, therefore, only relate to shipments originating at stations in Kansas, and have no application to a shipment originating in another State and consigned to a station in Kansas, as was the shipment in question here. So that in any view of the statute the attorney's fee provided thereby could not lawfully have been assessed in this case.

It may also be remarked in passing that that

portion of Section 6 of the act providing that the bill of lading to be given shall be conclusive proof of the amount received, was held unconstitutional by the Supreme Court of Kansas in the case of *Railway Company v. Simonson,* 64 Kan. 802.

In *Weber v. Railway Co.,* 69 Kan. 611, that court said:

"In view of the decision in *Railway Co. v. Simonson,* 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248, it is doubtful whether there is any vitality left in Chapter 100, Laws of 1893 (Gen. Stat. 1901, Secs. 5938-5947). Can it be said that the Legislature would have enacted the law with that part of Section 6 omitted which makes the bill of lading conclusive proof of the amount of grain received by the carrier?"

We ask that the judgment of the Supreme Court of Kansas be reversed.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

GARDINER LATHROP,

Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 347.

The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error,

v.

J. R. Harold, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

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HALL LITHO. CO. TOPEKA 17107

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BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

The first ground of defendant in error's motion to dismiss is that no Federal right, privilege or immunity was specially set up or claimed below, except the question of the attorney's fee. We must dissent from this statement. Both of the Federal questions which we are raising in this Court, were raised in the Supreme Court of Kansas, and both of said questions were decided by that Court contrary to the contentions of the Railway Company. It is not the fault of the plaintiff in error that the Kansas Supreme Court chose to follow its own decisions as to the rights of the assignee of a bill of lading, and to ignore the Federal decisions on

that subject, for the question was fully and fairly raised before that Court by the plaintiff in error and pertinent authorities cited.

But we maintain that it was not necessary in this case for the plaintiff in error, in order to raise the Federal questions, to specifically set them up in the pleadings. The action was brought upon an interstate bill of lading, which the Carmack Amendment requires the carrier to issue. That fact fixed and determined once for all the law which must govern the parties and the courts in the decision of the case. When once the evidence showed that the shipment was interstate the Federal law immediately took hold and has inhered in the case ever since. It controlled the rights of the parties all the time. It is a part of the very framework and structure of the case itself, and we cannot get away from it if we would. This consideration differentiates the case from one where a right of action arises out of local laws and the defendant relies for his defense upon some Federal right, privilege or immunity, which, of course, to be available, would have to be specially set up or claimed in the lower court. The case at bar is analagous to an action for personal injuries brought by an employe of a railway company, where it is held that if the evidence shows that the

employe was injured in interstate commerce at the time of his injury, the Federal law controls, to the exclusion of all state laws, notwithstanding no reference be made to the Federal law in the pleadings; that the state court is bound to take the same notice of a Federal law as of a state law and be governed accordingly.

> *Toledo St. L. & West. R. R. Co. v. Slavin*, 236 U. S. 454.

This action is in its essence a Federal *case* and not simply a case involving a Federal *question*—an important distinction which has been recognized by this court.

> *Pratt v. Paris Gas Light & Coke Co.*, 168 U. S. 255.

The gist of the plaintiff's action was the alleged failure of the defendant to transport and deliver the corn at Elk Falls within a reasonable time after the date shown in its bill-of-lading, and the defense set up by the Railway Company was that it transported and delivered said corn at Elk Falls within a reasonable time after it received the same from its connecting carrier, the Union Pacific Railroad. This defense, although contradicting the recitals in the bill-of-lading, was a valid one under the Federal decisions and was consequently a Federal

right, privilege and immunity specially set up and claimed in the trial court, and denied by that court and by the Supreme Court of Kansas. Thus it appears that there was a Federal question in the case from its inception.

Although the defendant in error contends that this was not a Federal question properly raised, he does, however, concede that the validity of the attorney's fees was a Federal question properly raised below, and since that question gives this Court jurisdiction, it will take cognizance of all the questions presented.

Mich. Cent. R. R. v. Vreeland, 227 U. S. 59, 63.

Ohio Tax Cases, 232 U. S. 576, 586.

Louis. & Nash. R. R. Co. v. Finn, 235 U. S. 601, 604.

The second contention is that the shipment in question was not interstate. This is based upon the claim that the transportation by the Union Pacific Railroad terminated at Topeka, and that the transportation over the plaintiff in error's road from Topeka, Kansas, to Elk Falls, Kansas, was a new and independent shipment wholly within the state. This claim is made for the first time in this Court, it having been conceded without question

during the whole course of the litigation heretofore, that the shipment was interstate. The contention that it is not interstate is not borne out by the facts. That it was interstate in its inception is not disputed and the evidence conclusively shows that there was no interruption in the transportation from Yanka, Nebraska, to Elk Falls, Kansas, exept that occasioned by the necessary transfer of the corn at Topeka, Kansas, due to a defective car. The original bill of lading issued by the Union Pacific Railroad Company at Yanka, Nebraska, on September 21, 1910, to James Bell & Son, consigned the car to Topeka, care of *Santa Fe for shipment*. (Ex. B. T. R. p. 9.) This conclusively shows that its final destination was not Topeka, since it was to be delivered to the Santa Fe for further shipment. The final destination had evidently not been determined upon by the Fisher Grain Company at the time it purchased the corn from Bell & Son, but after the transportation had commenced the Fisher Grain Company sold the corn to the Nevling Grain Company, which wished it delivered at Elk Falls, Kansas. This determined its final destination and a bill of lading to that point was accordingly obtained by the Fisher Grain Company from the Santa Fe Railway Company at Kan-

sas City, Missouri, on September 24, 1910 (dated September 21, 1910), which is the bill of lading in controversy. No attempt was made to deliver the car to any consignee at Topeka, nor was there any intention to do so, but it was understood by all concerned that the final destination of the car was some point on the Santa Fe road beyond Topeka, to be determined later.

This view is confirmed by the evidence of the witness E. W. Jette, agent of the Union Pacific Railroad at Topeka, Kansas, who stated that the destination of the car in question was Elk Falls, Kansas, and that upon its arrival at Topeka over the Union Pacific Railroad it was at once delivered to the Santa Fe Company for transportation to that point, but afterwards set back to the Union Pacific on account of the car being in bad order. (T. R. p. 8.) While the car was in course of transportation to Topeka and before the date of its arrival there, which was September 28, 1910, the Fisher Grain Company reconsigned the car to Elk Falls, to its order, notify the Nevling Grain Company, by surrendering to the Santa Fe Company the original Union Pacific bill of lading, and obtaining in lieu thereof the Santa Fe bill of lading issued at Kansas City. This reconsignment was ef-

fected on September 24th, although the bill of lading, as stated, was erroneously dated September 21st, which was actually the date of the Union Pacific bill of lading issued at Yanka. It will therefore be seen that before the original contract of transportation was completed, the car was reconsigned and the ultimate destination changed to Elk Falls, Kansas. So that in reality there was no break in the journey and the evidence clearly shows that it was not the intention of the shippers to complete the transportation at Topeka, but on the contrary it was their intention from the beginning to have the car delivered at some point beyond Topeka, although its final destination may not have been determined upon when the bill of lading was issued by the Union Pacific at Yanka.

These facts clearly distinguish the case from *Gulf, Colorado & Santa Fe Ry. Co. v. Texas,* 204 U. S. 403, for under the facts there it was held that there was a *completed contract of transportation* when the corn was delivered to the Hardin Company at Texarkana. It was there said that "Neither the Harroun nor the Hardin Company changed or offered to change the contract of shipment, or the place of delivery. The Hardin Company accepted the contract of shipment theretofore

made and purchased the corn to be delivered at Texarkana,—that is, on the completion of the existing contract. When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended."

In the case at bar there was no delivery to the Fisher Grain Company or to any one else at Topeka, nor any completed contract of transportation at that place, nor until the car of corn was delivered at Elk Falls, Kansas, its ultimate destination. The corn was sold by the Fisher Grain Company to the Nevling Elevator Company to be delivered at Elk Falls, before the arrival of the car at Topeka and during the course of its transportation to that point. Thus it appears that both the contract of shipment and the place of delivery were changed during the course of the transportation, thereby differentiating the facts from those in the Texas case. In addition to this is the further fact, already referred to, that the original bill of lading showed on its face that the transportation was to be continued beyond Topeka.

The case of *Gulf, Colorado & Santa Fe v. Texas* has been distinguished in the following cases:

So. Pac. Term. Co. v. Int. Comm. Comm. 219 U. S. 498, 527, where it was held that goods actually

destined for export are necessarily interstate as well as foreign commerce when they actually start in the course of transportation to another state, or are delivered to a carrier for transportation, and that this is the same whether the goods are shipped on a through bill of lading, or on an initial bill only to a terminal within the same state, where they are to be delivered to a carrier for the foreign destination.

> *Ohio R. R. Com. v. Worthington*, 225 U. S. 101, 109.

Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 127, 128, 129, where it was held that shipments of lumber on Local bills of lading from one point in a state to another point in the same state, destined from the beginning for export, are foreign and not intrastate transportation; that the essential character of the commerce, and not its mere accidents, determines whether it is intrastate or foreign.

Louisiana R. R. Comm. v. Tex. & Pac. Ry. Co., 229 U. S. 336, holding that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control thereof.

In *Baer Bros. v. Denver & R. G. R. R. Co.*, 233

U. S. 479, beer was shipped from St. Louis, Missouri, to Pueblo, Colorado, over the Missouri Pacific Railway for final destination at Leadville, Colorado. At Pueblo the Denver & Rio Grande Railway received the shipments from the Missouri Pacific on new way-bills, charging local rates from Pueblo to Leadville. This particular traffic continued for some years and the two railroads had no arrangements for through billing. This Court held that the traffic was essentially interstate commerce notwithstanding independent contracts of shipment from Puebo to Leadville on local way-bills, and that reparation for excessive rates was proper under the order of the Interstate Commerce Commission.

In *Kirby v. Railroad Co.*, 94 Kan. 485, it was held that where a car-load of emigrant goods and live stock is shipped by rail from Crescent, Oklahoma, to Hill City, Kansas, but the point of destination is altered by order of the shipper at Salina, Kansas, to Buffalo Park, Kansas, the entire transportation is governed by the regulations of interstate commerce. The case was distinguished from the case of *Gulf, Colorado & Santa Fe Railway v. Texas*, the court stating that that decision was placed upon the ground that the original interstate

transportation was completed at Texarkana, and that in the Kansas case the interstate carriage was not completed but merely the final destination of that interstate shipment was changed. That is the precise distinction which we make in the case at bar.

The practice of carriers allowing shippers reconsignment privileges, where the shipper desires to forward the shipment to a certain point and have the privilege of changing the destination or consignee while shipment is in transit, or after it arrives at the destination to which originally consigned, and to forward it under the through rate from point of origin to final destination, is recognized by the Interstate Commerce Commission as a privilege of value to the shipper and is approved by it, provided that the privilege and the conditions under which it may be used and the charge, if any, that will be made, shall be published in the tariff. (See I. C. C. Administrative Rule 74.)

While we think that the quetions raised by defendant in error upon his motion to dismiss are not properly so raised, as they go rather to the merits of the case, yet we have discussed them in this brief because they were not touched upon in our brief on the merits.

We ask that the motion to dismiss be denied,

Respectfully submitted,

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Of Counsel.

In The
Supreme Court of the United States

OCTOBER TERM, 1915

No. 347.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ... Plaintiff in Error,

vs.

J. R. HAROLD, ... Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

Motion To Dismiss.

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HODGSON-SMITH PRINT, WICHITA

IN THE

Supreme Court of The United States

OCTOBER TERM, 1915

No. 347

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ... Plaintiff in Error,

vs.

J. R. HAROLD, ... Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

The defendant in error moves the Supreme Court of the United States to dismiss the Writ of Error sued out herein, it appearing from the Transcript of Record before it that this Court has not jurisdiction, and for the following reasons:

1st. It does not appear that any Federal right, privilege or immunity was specially set up or claimed by the plaintiff in error in the trial court.

2nd. It does not appear that any Federal right, privilege or immunity was specially set up or claimed by the plaintiff in error in the Supreme Court of the State of Kansas.

3rd. It does not appear that the decision of the Supreme Court of Kansas was against the Federal rights, privileges and immunities now claimed and set up in this Court by plaintiff in error in the first four specifications of error as set out in its brief filed herein.

4th. It appears that the claim of Federal rights and privileges as now asserted by plaintiff in error in this Court in the

fifth and sixth errors specified in its brief filed herein, is frivolous.

5th. It does not appear that any Federal question is before this Court on the Writ of Error issued herein, or that, under the facts of the case, any Federal right, privilege or immunity could have been denied plaintiff in error by the Supreme Court of the State of Kansas.

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In The
Supreme Court of the United States

OCTOBER TERM, 1915

No. 347.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ... Plaintiff in Error,

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J. R. HAROLD, ... Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

Brief and Argument of Defendant in Error on His Motion to Dismiss.

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BOBSON-SMITH PRINT, WICHITA

ALPHABETICAL LIST OF CASES CITED.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1915

No. 347

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ...Plaintiff in Error,

vs.

J. R. HAROLD,.....Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR ON HIS MOTION TO DISMISS.

Defendant in error has filed a motion to dismiss the Writ of Error herein, on the ground that the record does not show that this Court can entertain jurisdiction. While by the provisions of the Judicial Code this Court may review a decision of the highest court of a State, which decision "is against the title, right, privilege, or immunity *specially set up* or claimed, by either party" under the Constitution, treaty, statute, commission, or authority of the United States, it no where appears in the record of this case that any right or privilege "was specially set up" by plaintiff in error, or that the decision complained of herein was against any right or privilege set up or claimed by plaintiff in error.

The Answer filed by the Railway Company to the petition of Harold, in the trial court, did not set up or claim any Federal right, (T. R. 5), nor did the Railway Company complain of the denial of any Federal rights in its specification of errors to the

trial court when it appealed to the Supreme Court of Kansas, (T. R. 12), it there contending only that the trial court erred in rendering judgment for the plaintiff. Surely such an assignment of error did not specially set up any claim of Federal right or privilege.

From the decision of the Supreme Court of Kansas (T. R. 13) it does not appear that plaintiff in error urged before it any claim of Federal right or privilege. It could not do so on the assignment of errors on which the case was before that Court. It does appear that the Supreme Court of Kansas did discuss, in its opinion, the question whether the statute of Kansas allowing an attorney's fee was repugnant to Federal laws, but it does not appear but what the Kansas law was upheld on the theory that no interstate commerce was involved. As far as its opinion shows the Supreme Court of Kansas may have affirmed the trial court on the theory that the shipment involved was intrastate and unaffected by any Federal statutes, or that there were no Federal laws pertaining to the shipment involved.

On its petition for rehearing, filed after the decision of the Kansas Supreme Court was rendered, the Railway Company did set up its claims of rights and privileges under Federal laws, just as it has done in its specifications of error in this Court, but as far as the record shows, this was the first time that such claims of rights were asserted. The State Supreme Court denied the petition for rehearing, without passing upon any of the questions raised by plaintiff in error. (T. R. 25).

Upon the record before this Court, the Writ of Error should be dismissed, it appearing that this Court has not jurisdiction, and for the following reasons:

1st. It does not appear that any Federal right, privilege or immunity was specially set up or claimed by the plaintiff in error in the trial court.

2nd. It does not appear that any Federal right, privilege or immunity was specially set up or claimed by the plaintiff in error in the Supreme Court of Kansas.

3rd. It does not appear that the decision of the Supreme Court of Kansas was against the Federal rights, privileges and immunities now set up in this court by plaintiff in error in its first four specifications of error as set out in its brief.

4th. It appears that the claim of Federal rights and privileges

as now asserted by plaintiff in error in this Court in the fifth and sixth errors specified in its brief herein, is frivolous.

5th. It does not appear that any Federal question is before this Court on the Writ of Error issued herein, or that, under the facts of the case, any Federal right, privilege or immunity could have been denied plaintiff in error by the Supreme Court of Kansas.

FIRST.

In its answer filed in the trial court, the Railway Company set up or claimed no Federal right or privilege, its only defense being that it was not liable for loss or damage occuring other than on its own road, and that no demand had been seasonably made on it by Harold. In other words it claimed that Harold's damage was caused by the Union Pacific, and that no attorney fee could be recovered for lack of demand, which demand it later admitted to have been made. (T. R. 9). Under the pleadings the trial court was most certainly not called upon to pass on any Federal question.

That a judgment of the State Supreme Court may be reviewed by this Court, it must affirmatively appear from the record that a Federal right, privilege or immunity was specially set up and claimed in the trial court.

Louisville & N. R. Co. vs. Woodford, 234 U. S., 46.
El Paso & S. W. R. Co. vs. Eichel, 226 U. S., 590.
Seaboard A. L. R. Co. vs. Duvall, 225 U. S., 477.
Cincinnati N. O. & T. P. R. Co. vs. Slade, 216 U. S., 78.
Waters Pierce Oil Co. vs. Texas, 212 U. S., 12.
Louisville & N. R. Co. vs. Smith et al, 204 U. S., 551.
Layton vs. Missouri, 187 U. S., 356.
Erie Rly. Co. vs. Purdy, 185 U. S., 148.

In Louisville & N. R. Co. vs. Woodford, supra, the facts were very similar to those herein. There, as in this case, the Railway Company did not attempt to make any defense in the trial court under the Carmack Amendment, but did so for the first time in the appellate court as "an afterthought" after this Court had rendered its decision in the case of Adams Express Co. vs. Croninger, 226 U. S., 491.

SECOND.

All that the record shows as to what claims the Railway Company asserted before the Supreme Court of Kansas is the assign-

ment of errors to the trial court, and the only errors called to the attention of the State Supreme Court were the rendering of any judgment against the Railway Company, and the rendering of the judgment in favor of Harold for an attorney's fee. (T. R. 12). Even though a Federal question had been presented to the State Supreme Court in the briefs of the Railway Company, which does not show from the record, the question was not specially set up or claimed as provided by the Code.

In Zadig vs. Baldwin, 166 U. S., 485, the only showing of a Federal right set up and denied was by a portion of the briefs submitted in the State Court. And this Court stated:

> "But, manifestly, the matters referred to form no part of the record and are not adequate to create a Federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the State."

The Supreme Court of Kansas, in its opinion, (T. R. 13), did discuss the question whether the Kansas statute allowing an attorney's fee in such cases was obnoxious to the federal regulations of interstate commerce, but such question was not before it on the assignment of errors made by the Railway Company. Moreover, it does not appear that the State Supreme Court in allowing the attorneys fee under the state statute, thereby necessarily found that interstate commerce was affected or that a claimed Federal right was denied the Railway Company.

THIRD.

Neither by the pleadings in the trial Court, the assignment of errors on appeal to the Supreme Court of Kansas, or the decision of the Supreme Court of Kansas, does it appear that the Railway Company ever specially set up or claimed any Federal rights, privileges or immunities now claimed by the Railway Company in the first four errors specified in its written argument. (Brief, p. 8). To give this Court jurisdiction to review the decision of the State Court, not only must it appear that a Federal right was set up and claimed but that same was considered and denied by the State Court. This principle has been too often announced to merit citations. There is not a word in the decision of the Kansas Supreme Court to indicate that the Carmack Amendment, or any other Federal statute or authority was ever set up by the Railway Company, except as same might have applied to the single question of the allowance of an attorney's fee. And cer-

tainly said decision is not "against the right, title, privilege or immunity" now claimed for the first time under the Carmack Amendment.

The Kansas Supreme Court held that by the laws and decisions of Kansas Harold was entitled to certain relief from the Railway Company. Before such decision of the State Court is reviewable here, it must affirmatively appear that, in according such relief to defendant in error, a Federal right was not only claimed by plaintiff in error, but that it was necessarily denied it by the decision complained of. It must be manifest, from the decision of the State Court, that its judgment could not have been rendered without denying a claimed Federal right.

Atlantic C. L. Rly. Co. vs. Glenn, decided by this Court Dec. 20, 1915.
Mellon Company vs. McCafferty, decided by this Court Nov. 29, 1915.
Chicago B. & I. R. Co. vs. Railroad Com. 237 U. S., 220.
Western U. Teleg. Co. vs. Wilson, 213 U. S., 52.
Waters Pierce Oil Co. vs. Texas, 212 U. S., 112.
Vandalia R. Co. vs. Indiana, 207 U. S., 359.
Arkansas S. R. Co. vs. Bank, 207 U. S., 270.
Leathe vs. Thomas, 207 U. S., 93.

In Arkansas S. R. Co. vs. Bank, supra, wherein recovery was had of the Railroad Company for violation of a state law in delivering goods without surrender of the bill of lading, this Court held:

> "Unless a decision (of a state court) upon a Federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and contains no Federal question, the same result must follow, as a general rule. * * * Therefore, if we should be of the opinion, as we are, that the Supreme Court rested its judgment upon principles of common law as it understood them, we should go no further, although the court also upheld and relied upon the statute, whether in our opinion its views were right or wrong."

In the recent case of Atlantic Coast L. Co. vs. Glenn, supra, the Railroad Company was sued on a delayed shipment of cattle, and in defense claimed that the delay occured on its connecting carrier, prior to its receipt of the shipment and that it was reliev-

ed of liability under a provision of the bill of lading, similar to the provision of its bill of lading pleaded by plaintiff in error herein. Under a state law declaring such provisions of the contract void, the trial court denied such defense to the Railroad Company. This Court denied a motion to dismiss, stating that as the Railroad Company was refused opportunity to show that no loss or damage occured on its line, that the jury could not have found for the plaintiff wholly irrespective of the statute, and therefore that the judgment could not have rested entirely upon an independent state ground broad enough to sustain it.

But in the case at bar, the plaintiff in error was allowed to introduce evidence under its answer, to show that any delay or loss did not occur on its road, and the trial court found against it on all the facts. Surely then, arguing inferentially from the cited case, the trial court might have found for the plaintiff therein, and the Supreme Court might have affirmed its decision, not upon any issue involving a Federal question, but upon an independent state ground, broad enough to support the judgment.

As that part of the judgment of the Kansas Supreme Court complained of in the first four specifications of error made by plaintiff in error in its brief, might have been, and evidently was, based upon an independent state ground broad enough to support it, it follows that it is NOT manifest to this Court that a Federal right was claimed by and denied to plaintiff in error, and in such case this Court will not exercise jurisdiction to consider the particular specifications of error referred to.

In N. O. & N. E. R. Co. vs. National Rice Mill Co., 234 U. S. 80, the railroad company, in an action against it for damages to rice lost in a flood, pleaded the Carmack amendment and stipulations of its bill of lading. The trial court found that there was negligence. And this Court, in dismissing the Writ of Error, stated:

> "As it clearly appears that the judgment rested upon a ground which was not only adequate to sustain it, but in entire harmony with the carrier's asserted Federal right, it cannot be said that there was a denial of that right in the sense contemplated by Sec. 237 of the Judicial Code."

The petition for rehearing filed by plaintiff in error in the State Supreme Court, after the decision of that Court was rendered, did present the Federal question now brought to the attention of this Court, but that petition was denied without comment, the Federal question thus tardily raised not being passed upon. (T. R. 25). It is too late to set up a claim of Federal right for

the first time on petition for rehearing, after the final judgment of the state court of last resort, unless it appears that the state court actually entertained the petition and decided the Federal question adversely to plaintiff in error. This Court has decided so frequently that a Federal question must be set up and decided by the state court of last resort, prior to the filing of a petition for rehearing, in order that such decision may be reviewable by this court under Section 709 of the Code, that we will merely refer to a few of the more recent decisions:

St. Louis & S. F. R. Co. vs. Shepherd, Decided Feb. 21, 1916.
Louisiana & N. R. Co. vs. Woodford, 234 U. S., 46.
Consolidated T. Co. vs. Norfolk & O. V. R. Co., 228 U. S., 326.
Forbes vs. State Council, 216 U. S., 396.
Waters Pierce Oil Co. vs. Texas, 212 U. S. 112.
McCorquodale vs. Texas, 211 U. S., 432.

Should this Court conclude that there is any Federal question disclosed by the record which merits its decision, we earnestly insist that it has no jurisdiction to consider any of the first four errors specified by plaintiff in error in its printed argument, for the reasons given.

FOURTH.

Should this Court find that a Federal question was presented to the Kansas Supreme Court relative to the allowance of an attorney fee under the statutes of Kansas, and that the plaintiff in error was denied some Federal right secured to it by the Carmack Amendment by the decision of that court, and that this Court has jurisdiction to review such Federal question, then defendant in error contends that such alleged Federal question is frivolous, and that for that reason the Writ of Error should be dismissed as to the fifth and sixth errors specified by plaintiff in error in its printed argiment.

The Supreme Court of Kansas decided that Section 7107 of the General Statutes of 1909, allowing a reasonable attorney's fee for the plaintiff's attorney in all cases in which judgment is rendered against a railway company for loss or shortage on grain shipped, is constitutional, following Railway Co. vs. Simonson, 64 Kan., 802. (T. R. 17). Of course as this decision was upon a matter of purely local law, it is binding upon this Court. In the case of Manley vs. Park, 187 U. S., 547, this Court held:

> "The first and second propositions, it is manifest, simply invite a consideration of the constitution and laws of the State of Kansas; and, consequently, the construction adopted by the Supreme Court of Kansas of the pertinent provisions of such constitution and laws is binding upon this Court as a decision upon a matter of purely local law, not presenting a Federal question."

Plaintiff in error now contends that the Kansas Statute is a nullity as affecting an interstate shipment of freight, and embracing the same field of legislation as does the Carmack Amendment.

The Kansas Statute referred to provides, among other things:

> "In all cases in which judgment shall be rendered against a railway company for loss or shortage on grain, seed or hay shipped, the magistrate or court shall also render judgment for a *reasonable* attorney's fee for the plaintiff's attorney;" provided that proper demand has been made, which demand was admitted in this case.

The Supreme Court of Kansas, in its decision, found that such statutory provision was a proper exercise of the police power of the state. As this Court has passed so flatly upon a similar statute of Texas, we think that any possible Federal question involved, as to the statute being obnoxious to the Commerce laws of the Nation, is frivolous, and does not merit further consideration by this Court.

In Missouri K. & T. Rly. Co. vs. Harris, 234 U. S., 412, this Court was called upon to decide whether a Texas statute was in conflict with the Carmack Amendment. The Texas statute provided that one having a valid claim against a person or corporation "for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation" may sue after thirty days' notice of demand, and if he establish his claim "he shall be entitled to recover the amount of such claim and all costs of suit and in addition thereto a reasonable amount as attorneys fees, provided he has an attorney employed in the case, not to exceed $20.00."

And in its decision this Court held:

> "And we think that where a state, as in this instance, for reasons of internal policy, in order to offer a reasonable incentive to the prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses,

> establishes by a general statute otherwise unexceptional the policy of allowing recovery of a moderate attorney's fee as a part of the costs, in cases where, after specific claim made and a reasonable time given for investigation of it, payment is refused, and the claimant succeeds in establishing by suit his right to the full amount demanded, the application of such statute to actions for goods lost in interstate commerce is not inconsistent with the provisions of the commerce act and its amendments."

As the Supreme Court of Kansas said, in its decision complained of herein, in considering the Harris case above cited:

> "While some points of difference between the Texas Statute and the Kansas Statute now under consideration are suggested, it is difficult to formulate any distinction in principle that would make the provisions relating to an attorney's fee in one valid and the other invalid."

As this Court has construed so similar a statute so recently and found it not repugnant to the commerce act, we think that the same question now attempted to be raised by plaintiff in error herein is frivolous. And for that reason, if for no other, we urge that the Writ of Error herein be dismissed, as same applies to the fifth and sixth specifications of error set out and relied on by plaintiff in error in its printed argument.

FIFTH.

The only Federal question attempted to be presented to this Court by plaintiff in error is that the decision of the State Supreme Court is obnoxious to the Federal commerce act and its amendments. And its whole argument is based on the assumption that the decision affected interstate commerce over which Congress has exercised its paramount legislative authority. If the shipment involved was in fact intrastate, not interstate at all, it surely follows that the Federal commerce acts have no application thereto, and hence that no Federal right could have been denied the Railway Company by the judgment complained of herein.

It has been repeatedly held by this Court that when the existence of a Federal question depends on questions of fact; when the question of law is interwoven with the question of facts, this Court may analyze the evidence, when same is before it, to the extent necessary to determine whether in fact a Federal question is involved.

Norfolk & W. Rly. Co. vs. Conley, 236 U. S., 605.

Wood vs. Chesborough, 228 U. S., 672.
Southern Pacific vs. Schuyler, 227 U. S., 601.
Creswill vs. Grand Lodge K. P., 225 U. S., 246.

Defendant in error contends that this Court can exercise no jurisdiction over the Writ before it for the reason that the record does not disclose that any Federal right was denied to plaintiff in error by the Supreme Court of Kansas, as it fails to show that the shipment involved was interstate.

As indicated in our statement of facts, preceeding, not only does the record fail to show that the shipment was interstate, but it shows conclusively that it was intrastate. To review the facts applicable:

The car of corn was shipped by Bell & Son from Yanka, Nebraska, on September 21, 1912, over the Union Pacific railroad, to Topeka, Kansas, to C. V. Fisher Grain Company, who paid Bell's draft, attached to the bill of lading issued by the Union Pacific, "and came into possession of the car." (T. R. 7). There is nothing to show when Fisher took up the bill of lading, whether the evening of the 21st, or later. The freight due the Union Pacific for transporting the car to Topeka was paid to it by either Bell or Fisher, it matters not which. When the Union Pacific delivered that car to Fisher at Topeka, its contract of carriage was completed, without it being indicated in any manner that the car was later going to be moved on from Topeka. Plaintiff in error has failed to show that there was any intention of a shipment farther than Topeka when the bill of lading was issued by the Union Pacific at Yanka. It cannot be assumed that Bell shipped the car to Topeka with the intention of rebilling it on from there, for the corn might well have been intended for ultimate consumption at Topeka. After Fisher took up the Union Pacific bill of lading, which must have been on or before September 24th, he certainly could have had the car of corn unloaded in an elevator at Topeka, or there delivered to a feeder. But instead of that he sold the car of corn to Nevling Elevator Company on September 24th, and had the car billed to him at Elk Falls, Kansas. As far as the record shows Fisher sold this corn to Nevling, delivered to him at Topeka, for Nevling, by his vendee, Harold, paid the freight on the corn from Topeka to Elk Falls. The evidence discloses that this car of corn did not in fact arrive at Topeka until September 28th, though the Santa Fe had issued billing on it out of Topeka on the 24th. Plaintiff in error states in its brief (p. 21) that Fisher knew, on September 24th, that the

car of corn was then in transit between Yanka and Topeka. There was no evidence of such knowledge. If presumptions are to govern, it may fairly be presumed that Fisher thought the car then in Topeka, ready for delivery at his order, the Union Pacific then having had three days in which to transport the car some hundred and fifty miles from Yanka. He could not have known as much about the location of the car as the Santa Fe, which was willing, on the 24th, to issue to him a bill of lading acknowledging receipt of the car for transportation to Elk Falls.

The Union Pacific transported the car to Topeka, and there held it subject to the order of the owner, Fisher, who, in effect, gave the Santa Fe an order to get it from the Union Pacific and carry it on to Elk Falls. True, the Union Pacific delivered the car to the Santa Fe, but in so doing it acted not as a carrier, but as a forwarder.

Instead of Fisher actually surrendering his bill of lading to the Union Pacific and getting physical possession of the car, and then taking the car to the Santa Fe to be billed to Elk Falls, Fisher gave the Union Pacific bill of lading to the Santa Fe, and told it to get the car for him, just as he might have given the bill of lading to an elevator company at Topeka and told it to get the car, if it was in or when it arrived, and unload it in their elevator.

While the bill of lading issued by plaintiff in error recites on its face that it received the car of corn at Kansas City, Missouri, there has been no contention that such was the fact. The evidence is not disputed that the car was received at Topeka, it being explained by the Railway Company that its bill of lading was given at Kansas City, Missouri, simply because the original purchaser, Fisher, was located at that point. Moreover, the Carmack amendment, now relied on by plaintiff in error, says nothing about a bill of lading issued in one state for transportation in another state, but applies only to a common carrier "receiving property for transportation from a point in one state to a point in another state." The Railway Company's error in its issuance of the bill of lading at Kansas City, Missouri, can not make an interstate shipment out of one otherwise intrastate.

This car of corn was not carried by plaintiff in error under through billing from Yanka, Nebraska, to Elk Falls, Kansas, but was transported by it from Topeka to Elk Falls, Kansas, after its receipt at Topeka under an entirely separate shipment, under a bill of lading covering only the transportation by it, for which

transportation it charged only the freight due from Topeka to Elk Falls.

The facts in this case are almost exactly analogous to those controlling the decision of this Court in Gulf C. & S. F. R. Co. vs. Texas, 204 U. S., 403, even to the commodity handled. By a change of names, that decision will very well fit this case.

Therein corn was shipped from South Dakota by Forrester to Texarkana, Texas, to shipers order, notify Harroun, at Texarkana, Harroun having bought the corn to be delivered at Texarkana, the original shipper paying the freight to Texarkana. While in transit Harroun sold the corn to Hardin, to be delivered at Texarkana. Hardin had previously sold corn to Saylor & Burnett at a price for delivery on track at Goldthwaite, Texas. Harroun's agent at Texarkana was given blank bills of lading, prepared by Hardin, which were then executed by the T. & P. Rly. Co. and covered the shipment of the corn from Texarkana to Goldthwaite, consigned to shippers order, notify Saylor & Burnett at Goldthwaite. Harroun, getting the executed bills from the T. & P. Rly. Co. delivered them to Hardin and received from him the sale price of the corn. Neither Harroun or Hardin had a warehouse at Texarkana, but Harroun's agent there attended to the reshipping, surrendering the bills of lading under which the corn came in to Texarkana, and taking bills of lading from the T. & P. Rly. Co. for the shipment on from Texarkana. The cars were set over to the T. P. Rly. Co. by the incoming carrier "under original seals and without breaking packages."

The question presented to this Court was whether the shipment from Texarkana to Goldthwaite was interstate or not. If not, then it was subject to the regulations of the Texas State railroad commission. This Court found such shipment to be intrastate, and not affected by the commerce acts of the United States, and in its opinion after stating the contention of the Railroad Company that the local transportation from Texarkana to Goldthwaite was but a continuation of an interstate shipment, and its interstate character was not affected by various changes of title and issues of bills of lading, said:

> "The corn was carried from Texarkana, Texas, to Goldthwaite, Texas, upon a bill of lading which, upon its face, showed only a local transportation."
>
> "The transportation which was contracted for (previously) and which was not changed by any act of the parties, was transportation from Hudson to Texarkana—

that is, an interstate shipment. The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier. Neither the Harroun nor the Hardin company changed or offered to change the contract of shipment or the place of delivery. The Hardin company accepted the contract of shipment thertofore made, and purchased the corn to be delivered at Texarkana—that is, on the completion of the existing contract. When the Hardin company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligation to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, it is acting not as a carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn was delivered to the Hardin Company at Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned."

And in the cited case, this Court states that there is no difference betweent an interstate passenger and an interstate freight shipment. To use that illustration: Suppose that Fisher, in this case, had purchased a ticket over the Union Pacific from Yanka, Nebraska, to Topeka, Kansas, and, after the Union Pacific trip was completed, he went from the Union Pacific to the Santa Fe station, at Topeka, and purchased a ticket which carried him on to Elk Falls. Most certainly such Santa Fe ticket would not be for interstate transportation. Unless he had bought a through ticket, over both carriers, for a through fare, his trip from Topeka to Elk Falls would be intrastate.

In the case at bar the original shipper at Yanka sold the corn to Fisher delivered at Topeka, and the transportation contracted for with the Union Pacific, and the freight paid thereon, was only to Topeka, where it was delivered to Fisher's order after the completion of the existing contract. Fisher sold the corn to Nevling at Topeka and undertook to have it billed on to Elk Falls over the Santa Fe, just as Harroun sold his corn to Hardin at Texarkana, and undertook, by his agent at Texarkana, to have it billed on to Goldthwaite. Neither Harold, Nevling, or Fisher, had

any contractual relations with the Union Pacific, but only with the Santa Fe, which carried the corn from Topeka, and collected the freight only for such carriage. When the corn was billed from Yanka to Topeka it was not necessarily intended that it would be again shipped from there, and there was nothing in the character of the commerce to indicate shipment further than to Topeka.

This Court has repeatedly reaffirmed the principles set out in the Goldthwaite case, and differentiated it from other cases, as see the following:

Southern Pacific vs. Interstate Commerce Com., 219 U. S., 498.

Railroad Commission of Ohio vs. Worthington, 225 U. S., 101.

Texas & N. O. R. Co. vs. Sabine Tram. Co., 227 U. S., 111.

Railroad Com. of Louisiana vs. T. & P. Rly. Co., 229 U. S., 335.

Chicago M. & St. P. R. Co. vs. Iowa, 233 U. S., 334.

In the first four cases referred to, the traffic in question was found to be interstate or foreign, even though the commodity was shipped to a certain point on a separate billing and there reshipped, but in every case it was evident from the character of the commerce that it was intended for foreign or interstate shipment.

In Southern Pacific vs. I. C. C., cotton seed was shipped to Galveston under billing to that point, there unloaded, ground, and reshipped for export. But it was held that the shipment to Galveston was necessarily only a part of foreign commerce "there being no consumption of the products at Galveston," and it being evident that the meal was to be transshipped for export.

In Railroad Co. vs. Worthington, supra, a rate on coal from points in Ohio to Huron was in question, the rate not applying unless the coal was shipped on from Huron to other states. Held that from the character of the shipment it was interstate, and in differentiating from the Goldthwaite case, it was said:

> "There a new and independent contract for intrastate shipment was made, the interstate shipment having been fully performed; here a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the state destination."

In Texas & N. O. R. Co. vs. Tram. Co., supra, the question was whether lumber shipped to Sabine on separate billing, and there

loaded on vessels for export, was a part of foreign commerce. Held:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents should determine."

And this Court therein again approved the Goldthwaite case and differentiated it by reason of the different facts involved.

In Railroad Commission vs. T. & P. R. Co., supra, it was held that logs and staves, shipped to New Orleans, comprised foreign commerce, they being intended for export, and there being no interruption of the foreign shipment except for trans-shipment at the port, and hence that the facts were different from those on which the Goldthwaite decision was based.

In Chicago M. & St. P. R. Co. vs. Iowa, supra, this Court directly followed the principles of the Goldthwaite case. Where coal was shipped from out of the state into Davenport, the freight being there paid, and such coal was then billed out to points in the state, under separate billing, such later shipments comprised intrastate commerce. In the opinion is this:

> "But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same state from having an independent and intrastate character. (Citations). The question is with respect to the nature of the actual movement in the particular case."

In Cincinnati N. O. & T. P. R. Co. vs. Interstate Commerce Com., 162 U. S., 184, it was held that where the Georgia Railway Company, a carrier wholly within the state of Georgia, carried goods from Atlanta to Social Circle, but on through billing from a point out of the state clear through to Social Circle, its rate charged for such carriage was subject to Federal control. In its opinion this Court concedes that if the goods, coming from without the state:

> "had reached Atlanta, and then and there, for the first time, and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the State of Georgia."

> "All we wish to be understood to hold is, that when goods shipped under a through bill of lading, from a point in one state to a point in another, are received in trainsit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for the continuous carriage or shipment within the meaning of the act to regulate commerce."

Surely the reverse of this proposition is equally true.

In Penn. Rly. Co. v. Knight, 192 U. S. 21, in determining that certain cab service in New York City was not a part of interstate commerce, this Court announces this doctrine:

> "Whenever a separation in fact exists between transportation service wholly within the state and that between the states, a like separation may be recognized between the control of the State and of the Nation."

Most assuredly, in the case at bar, a separation did in fact exist between the shipment from Yanka, Nebraska, to Topeka, and from Topeka to Elk Falls.

In South Covington Street Car Co. vs. Covington, 235 U. S. 537, it was determined that street car transportation from Covington, Kentucky, across the state line to Cincinnati, Ohio, was interstate and not subject to state control, because:

> "Here is an uninterrupted transportation of passengers between states, on the same cars, and under practically the same management, and for a single fare. We have no doubt that this course of business constitutes interstate commerce."

But if transportation of the same commodity in two different states was interrupted, by two different carriers, under separate managements, for two entirely separate freight charges, and under separate contracts of shipment, would not such transportation in the one state constitute intrastate commerce?

In Penn. Rly. Co. vs. Mitchell Coal & Coke Co., 238 U. S. 251, it was determined that where coal was shipped within the state to Greenwich, where the first contract of carriage was ended, it was immaterial, in determining whether such shipment was intrastate, that the coal had then been shipped from Greenwich to points without the state. In the opinion this Court holds:

> "While it appears that part of the coal was shipped from the mines to Greenwich, that the plaintiff there * * * possibly re-shipped some to other places, it does not appear that any of it went out of the state, or,

> if it did, that the circumstances were such that its carriage from the mines to Greenwich was in fact but part of an intended and connected transportation beyond the state."

In case at bar, it does not appear, as it must before this Court can entertain jurisdiction, that the shipment of the corn from Topeka to Elk Falls was in fact but a part of the connected and intended transportation from beyond the state.

From the facts as they affirmatively appear before this Court, and the law applicable as enunciated by this Court, we earnestly insist that it is not shown that the transportation of the car of corn by the Railway Company for Harold, from Topeka, Kansas, to Elk Falls, Kansas, was a part of an interstate shipment, and this being so, it necessarily follows that any decision of the Supreme Court of Kansas cannot be obnoxious to the Federal laws pertaining to interstate commerce, and hence that this Court cannot entertain jurisdiction of the Writ of Error herein.

And in conclusion the defendant in error contends that this cause should be dismissed by this court for lack of jurisdiction because of each and all of the reasons heretofore presented. Even should this Court find that the shipment involved was interstate, the Railway Company did not make any claim of Federal rights in the trial court or in its assignments of error on appeal to the Supreme Court of Kansas. Should that be found to be unnecessary, the Supreme Court of Kansas does not appear to have had before it, to have considered, or to have denied, any Federal right claimed by the Railway Company, except as same pertained to the allowance of an attorney's fee to Harold. And even the right of a state to allow an attorney's fee in such cases has been so recently and conclusively determined by this Court, that a Writ of Error based on such a contention is frivolous and does not merit the attention of this Court.

Wherefore we ask that the Writ of Error issued in this case be dismissed.

Respectfully submitted,

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In The
Supreme Court of the United States

OCTOBER TERM, 1915

No. 347.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ... Plaintiff in Error,

vs.

J. R. HAROLD, ... Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

Brief and Argument of Defendant in Error.

W. A. AYERS,
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Of Counsel.

HODGSON-SMITH PRINT, WICHITA

SUBJECT INDEX.

ALPHABETICAL LIST OF CASES CITED.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR

STATEMENT.

The plaintiff in error has seen fit to disregard the facts upon which the Supreme Court of Kansas has based its decision, complained of herein, and has made a statement of facts contrary thereto, as such decision shows, (T. R. 13-14) and contrary to the facts as they appeared in the trial court, as shown by the Transcript of Record. Under such circumstances we deem it necessary to re-state the facts as they appear from the record and as the Supreme Court of Kansas found them to be.

As Harold, defendant in error, alleged in his petition, (T. R. 2) and as the evidence discloses, (T. R. 6-29) he sold to Shoe & Jackson, on September 14, 1912, a car of corn to be *shipped*, not delivered, within seven days, and then, to fill such sale, bought a car of corn from the Nevling Elevator Company which applied car No. 33791, containing corn, and endorsed over to him, for value, the bill of lading involved herein, issued by the Railway Company, plaintiff in error, (T. R. 9) which showed receipt by it, at Kansas City, Missouri, on September 21, 1912, from the C. V. Fisher Grain Company, of said car of corn, consigned to

Shippers Order, at Elk Falls, Kansas, notify Nevling Elevator Company, which bill of lading had been endorsed over to Nevling by Fisher. (See copy opposite T. R. 4.) This bill of lading was not an *exchange* bill, as insisted by plaintiff in error in its statement of facts and argument, and did not indicate that the car of corn covered thereby had originated other than at Kansas City, Missouri, on September 21st, on the line of the plaintiff in error, or that any other carrier had ever had such car in its possession. (See copy thereof.) The Railway Company did not deliver this car of corn at Elk Falls until October 14, 1912. (T. R. 6.)

Shoe & Jackson refused to accept said car of corn when tendered by the Railway Company on the bill of lading which Harold had endorsed to them to fill his contract, at the contract price of 63 cents per bushel, "because we bought the car at 63 cents per bushel on a seven days shipment, and the car did not arrive for about thirty days, and the *price had then declined* to 55 cents per bushel," which price Harold received for the corn. (T. R. 6.) The market price of corn began to fall about the 1st day of October. (T. R. 7.)

In its Answer (T. R. 5) the Railway Company alleged that the car of corn in question was in fact billed from Yanka, Nebraska, over the Union Pacific lines on September 21st, to C. V. Fisher *at Topeka,* Kansas, where it received same, and transported it from Topeka to Elk Falls, in the same state, within a reasonable time, and that said car of corn was transported by it under the bill of lading set out in the Transcript of Record. The only contention of the Railway Company in the trial of the case in defense of its alleged negligence was that by reason of clause 2 on the back of the bill of lading it was liable only for the loss and damage occurring on its own lines.

The evidence on the trial disclosed that the bill of lading, showing receipt of the car of corn at Kansas City, Missouri, on September 21st, was not in fact issued by the Railway Company until September 24th, the date being an error, and that the plaintiff in error in fact received the car of corn at Topeka, Kansas, not Kansas City, Missouri, for transportation from Topeka to Elk Falls, and that it did so transport it under the bill of lading issued to Fisher at Kansas City. The bill of lading was issued at Kansas City, instead of Topeka, where the car was received, because the C. V. Fisher Grain Company, the consignor, was located there. (T. R. 8.)

The bill of lading was not at *Exchange* one, as can be seen from its face, and as far as it is concerned, and as far as the evidence disclosed, there was no connection of any kind between the plaintiff in error and the Union Pacific in the handling of this car, except that the Union Pacific, at the request of the owner, and simply as a forwarder, delivered same to the Santa Fe at Topeka.

While this car of corn appears to have been originally shipped from Yanka, Nebraska, on September 21st, by Bell & Son, to C. V. Fisher at Topeka, and to have been transported to Topeka by the Union Pacific, it does not appear that same was transported by the Santa Fe from Topeka on through billing from Yanka. It does appear that the car was carried from Yanka to Topeka by the Union Pacific and there delivered by it to Fisher, or to his order, and that the freight was paid to the Union Pacific for that carriage, and that that shipment was then completed. Fisher could have unloaded the car at Topeka without the plaintiff in error ever even learning of the existence of the car.

Not only has plaintiff in error failed to show a through shipment from Nebraska to Elk Falls, Kansas, but the bill of lading itself shows conclusively that the transportation from Topeka to Elk Falls, by it, was under a separate and distinct contract. Moreover the freight bill paid by Harold (T. R. 11) shows on its face that the Santa Fe collected freight, as a separate item, from Topeka to Elk Falls. The plaintiff in error will hardly contend that the 9½ cents per hundred freight bill paid to it by Harold covered any transportation other than that from Topeka to Elk Falls.

In short, Fisher bought this car of corn of Bell & Son, who delivered it to him at Topeka, the freight being paid to that point, regardless of any further transportation. As a separate transaction entirely, Fisher sold the car of corn to Nevling, Harold's vendor, and delivered it to him at Topeka, and furnished him a bill of lading, issued by plaintiff in error, under which it undertook to carry the car on to Elk Falls and to there deliver it to the holder of such bill of lading. It appears that Fisher did not in fact surrender any bill of lading to the Union Pacific direct and then go to the Santa Fe and there take out the bill of lading in question, but he did, as stated by Mr. Pribble, (T. R. 7) pay the shippers draft, attached to the original bill of lading, "and came into possession of the car." He then gave

the Santa Fe what was in effect an order for the car by surrendering to it the Union Pacific bill of lading, which thereupon delivered the car to the plaintiff in error, and under the new bill of lading issued by it to Fisher, plaintiff in error then carried the car on to Elk Falls, and delivered it to Harold's vendee, and Harold paid the freight for such transportation.

The plaintiff in error first received this car at Topeka, on Fisher's order, on September 28th, not on the 24th when its bill of lading acknowledging receipt was in fact issued, but as the car was in bad order, it sent it back to the Union Pacific which transferred the contents to another car and redelivered it to the Santa Fe, which then transported it to Elk Falls, under the bill of lading previously issued, and under a waybill dated September 30th. (T. R. 11.)

The trial court rendered judgment for Harold for his loss of 8 cents per bushel, resulting from the decline in price, also for a small overpayment of freight, and for the value of some corn lost in transit, and also rendered judgment to plaintiff for an attorney's bee of $50.00, (T. R. 11) which sum of $50.00 the plaintiff in error agreed would be a reasonable fee. (T. R. 9.)

There is nothing in the record to disclose what facts the trial court found; whether Harold was damaged because the bill of lading showed receipt of the car at Kansas City, instead of Topeka, or because the bill of lading was dated September 21st, when not in fact issued until September 24th; whether Harold was damaged because the Railway Company issued the bill of lading on the 24th, when the car was not tendered to it until the 28th, or because the Railway Company first received the car at Topeka on the 28th, and did not deliver it to the holder of the bill of lading at Elk Falls until October 14th; whether the Railway Company was negligent in issuing the bill of lading before actual receipt of the car or in taking an unreasonable time to transport it and deliver it to consignee after it did receive it. Under the issues as raised by defendants answer in the trial court, it evidently found that whatever loss or damage Harold suffered, occurred on the road of plaintiff in error.

As noted, the Railway Company's answer raised but the one defense, that it was not liable for loss or damage not occurring on its own road. In other words it contended that Harold's damage occurred on the Union Pacific line, not its own, and in finding for the plaintiff the trial court must have found that

the Union Pacific was not responsible for Harold's damage, but that same occurred on defendant's own road.

While the plaintiff in error complains that the Supreme Court of Kansas erred in its pronouncement of law as applied to interstate shipments, it no where appears that the question of interstate commerce was raised by the Railway Company or adjudicated by the judgment of the trial court, which was affirmed by the Supreme Court, or that the Federal question based on an interstate shipment was presented to or passed on by the Supreme Court of Kansas, except as to the one question of the allowance of an attorney's fee. The first four of the errors specified by plaintiff in error in its printed argument do not appear to have been presented to the Supreme Court of Kansas, or decided adversely to the Railway Company in its decision, and the Federal question therein raised was not called to the attention of the Kansas Supreme Court until the filing by plaintiff in error of its petition for rehearing therein, which petition was denied without comment.

ARGUMENT ON SPECIFICATIONS OF ERROR

If the motion of defendant in error to dismiss the Writ of Error is denied, then it must be assumed that this Court finds that the shipment involved herein was interstate, in which case it originated at Yanka, Nebraska, on September 21st, and ended at Elk Falls, Kansas. So defendant in error will base his argument on the specifications of error on the same assumption.

I.

Plaintiff in error argues the first three errors specified in its brief, together, and we will do likewise, as they all pertain to the rights of Harold, assignee of the bill of lading issued by the Railway Company.

In the first place, the Railway Company bases neither its specifications of error or its argument upon the facts appearing in the record or as found by the Supreme Court of Kansas. Most of the argument is a statement of facts, incorrect in the following particulars:

The Railway Company did not issue an *exchange* bill of lading to Harold's vendor, but an *original* bill. The Union Pacific, receiving the car of corn at Yanka on September 21st, first delivered it to the Santa Fe at Topeka on the 28th, which waybilled it out to Elk Falls on September 30th, but did not deliver

same at Elk Falls until October 14th, though two or three days was a reasonable time for the transportation from Topeka to Elk Falls. There is nothing to indicate whether Harold was given damages because of delay, or because the Santa Fe did not indicate on its bill of lading that the car was originally shipped on September 21st, or because the bill of lading showing receipt of the corn at Kansas City on the 21st, was not in fact issued until the 24th, and receipt was not in fact had until the 28th. Harold did not contract to *deliver* the corn at Elk Falls within seven days of September 14th, but his contract was for *shipment* by that date. The Supreme Court of Kansas did not hold the Railway Company liable for failure to *deliver* the corn at Elk Falls by a certain date. Harold did not come into possession of the bill of lading *after* the time limit of his contract of sale had expired, for he was well within his contract rights in tendering to his vendee a bill of lading showing shipment by the 21st, even though it was not endorsed to him until the 24th, or even later. It certainly *was* contended by defendant in error, and the Supreme Court of Kansas was assuredly justified in assuming, that if the corn had been delivered to Elk Falls within a reasonable time after September 21st, the date of the original shipment and of the bill of lading, that Harold's purchaser would have accepted the corn at the contract price. The purchaser himself said so. (T. R. 6.) Harold did *not* claim and the Supreme Court did *not adjudge* that the Railway Company was bound to transport the corn in time for any particular market or otherwise than with reasonable dispatch, and without losing any of it. We concede the rule laid down in Chicago & Alton R. Co. v. Kirby, 225 U. S. 155, cited by plaintiff in error, but how does such rule pertain to this case? The Supreme Court of Kansas did *not* impose any obligation whatever on the Railway Company to deliver the corn at Elk Falls within a *definite* time, regardless of excuses for delay. It is not shown that Fisher knew anything about the car in transit from Yanka, except that it was billed out of Yanka on the 21st, and that the Santa Fe billing out of Topeka was issued to him on the 24th. Fisher was justified in assuming that the car of corn was in Topeka on the 24th, as it then had had three days to be moved some hundred and fifty miles. No *diversion* order was given by Fisher; he merely surrendered the Union Pacific billing to Topeka, and took out new billing over the Santa Fe from Topeka to Elk Falls.

Under the Railway Company's answer in the trial court, it

was permitted to show all the excuses it had for delay or loss, and that the bill of lading, dated September 21st, was not in fact issued until the 24th, and with all the evidence before it the trial court found against it, which judgment the Kansas Supreme Court affirmed. The record does *not* show that no delay occurred on the road of plaintiff in error. The Railway Company now makes a finding of fact for itself, which the trial court did not necessarily make.

If the shipment in question was interstate, it must have originated at Yanka on September 21st. Otherwise the Carmack amendment, now specially set up by plaintiff in error for the first time, could not apply. And if this was a shipment governed by the Carmack amendment, was not the trial court, as affirmed by the Supreme Court of Kansas, justified in holding the Railway Company liable for all loss and damage occurring between Yanka and Elk Falls, on whatever road it occurred? Note the wording of the Federal legislation relied on by plaintiff in error:

> "That any common carrier . . . receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or *by any common carrier . . . over whose line or lines such property may pass*, and no contract . . . shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

The judgment herein of which complaint is made, does not indicate that any right or immunity under the commerce laws of the nation was denied the Railway Company.

But the plaintiff in error contends that as the shipment in question was interstate, the Federal rule as to Harold's rights, as lawful holder of the bill of lading, must control, and cites in support of such contention the cases of Adams Express Co. v. Croninger, 226 U. S. 491, and Mo., Kan. & Tex. Ry. Co. v. Harriman, 227 U. S. 657.

In both of the cited cases, and in later decisions of this Court, it has been held that a railroad is not bound by a state *law* governing its liability on an interstate shipment. Plaintiff in error has not cited,nor can we find, a single decision of this Court holding that Federal legislation has in anywise affected

the right of a State to make a railroad liable, under the common law, for acts of misfeasance, though interstate commerce may be affected. And every later decision which follows the Croninger case pertains to the validity of a state *law* which is superseded by the Commerce acts and amendments thereof.

In the Croninger case, wherein was decided the invalidity of a state law forbidding a carrier to limit by contract its liability for goods lost, this Court said:

> "It is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state. Such regulations would fall within that large class of regulations which it is competent for a state to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers, and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected."

While the Carmack amendment covers the subject of a carrier's liability "for any loss, damage, or injury to such property caused by it or by any common carrier . . . over whose line or lines such property may pass" it most certainly does *not* embrace the subject of a carrier's liability for its negligence or misfeasance in issuing an incorrect bill of lading. The liability of a carrier for injuries to property carried under a bill of lading used by it, and its liability for error in the bill of lading itself, are two separate subjects. Congress has legislated relative to the one, but not relative to the other.

We contend that it was the common-law duty of the Railway Company to issue a correct bill of lading, and concerning such common-law liability Congress has not legislated. In Eastern R. Co. v. Littlefield, 237 U. S. 140, damages were allowed against a carrier for failure to furnish cars as promised, and this Court held:

> "The question as to whether *at common law* these railroads were liable as forwarders of freight to be delivered to connecting carriers outside the state, and whether the railroads were so associated as to make them jointly and severally liable are matters concluded by the decision of the Supreme Court of Texas."

So is not the decision of the Supreme Court of Kansas *conclusive* as to the common-law liability of the plaintiff in error for the issuance of an incorrect bill of lading?

If Harold's recovery against the Railway Company had been based solely on its error in issuing the bill of lading, and not primarily on the delay in transportation, the Railway Company's liability would have been under the common-law, and not under the Carmack amendment.

But assume, for argument, that the Railway Company's liability to Harold was subject entirely to Federal rules, and particularly to the Carmack amendment. What right or privilege has been denied to the Railway Company that was secured to it by Federal legislation? The judgment complained of awarded to Harold damages resulting from a delayed shipment, he relying on the bill of lading issued to him, and the corn not being delivered to his vendee within a reasonable time after the date on which it acknowledged receipt thereof. The Railway Company issued an original bill of lading on September 24th, which showed receipt of the car of corn by it, at Kansas City, on the 21st, billed to Elk Falls, when in fact the car of corn was received by the Union Pacific at Yanka, Nebraska, on the 21st, and was not received by the Santa Fe from the Union Pacific until the 28th, and then at Topeka. Harold was damaged because his vendee refused to accept it on contract when delivered on October 14th, he contending that the corn should have been delivered to him at Elk Falls within a reasonable time after September 21st. The evidence shows that while in transit between Yanka, Nebraska, and Elk Falls, Kansas, the car was detained in Topeka at least eight days, certainly through no fault of Harold's. The Santa Fe says the fault was with the Union Pacific.

If the shipment was interstate, and our argument is based on that assumption, and if the Carmack amendment governs the liability of plaintiff in error, is not it absolutely liable thereunder, as well as under the common law? Either the Carmack amendment applies to this shipment or it does not. If it does, it specifically provides that a railroad shall issue a receipt or bill of lading (presumably correct) for goods to be transported from one state to another, "and shall be liable to the lawful holder thereof (Harold in this case) for any loss, damage, or injury to such property caused by it or by any common carrier . . . over whose line or lines such prop-

erty may pass" How does it affect Harold's right to recover from plaintiff in error, whether the loss and damage occurred on the Santa Fe or the Union Pacific line, if it was a connected, interstate shipment?

While in most of the cases where one of two connecting carriers is held liable, the recovery has been against the initial carrier, this is not necessarily so. In the Croninger case, relied on by plaintiff in error, this Court, in discussing the scope of the Carmack amendment, says:

> ' 'One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable."

In Atlantic C. L. Ry. Co. v. Glenn, decided by this court December 20, 1915, Glenn sued the defendant for delay in shipping cattle, and it answered that the delay was on the line of the Southern Railway Company, the initial carrier, which defense was denied it under a state statute. In discussing the Riverside Mills decision on the Carmack amendment, this Court says:

> "But it is insisted that it can here have no application because liability is imposed by state statute upon the terminal and intermediate carriers as well as the initial or receiving carrier; while in the Riverside case the liability alone of the latter was under consideration. But it is obvious that this proposition challenges not the power, but the wisdom of exerting it, since in the nature of things the power to constitute an initial carrier the agent of the terminal carrier is not different from the power to make the terminal carrier the agent of the initial carrier."

And the Carmack amendment does not limit liability to the intitial carrier, but says that the carrier issuing the billing shall be liable for loss caused by *any* carrier over whose lines the property may pass. So surely the plaintiff in error was properly held liable to Harold for the loss sustained by him for delay, whether the delay was on its line, or on that of the initial carrier.

But the Railway Company now contends that as it had not yet received the car of corn from the Union Pacific on the date

indicated in its bill of lading, that such bill of lading could not be a valid contract. And it tries to excuse its negligence in dating the bill the 21st, when it was not in fact issued until the 24th, though offering no excuse for issuing the bill on the 24th, when it in fact did not receive the corn until the 28th. But assuming that this was an interstate shipment, the car of corn *had* been received on the 21st, by the connecting carrier, the *agent* of plaintiff in error. The error was not in acknowledging receipt on the 21st, but in acknowling receipt *other than at Yanka, Nebraska*, on the 21st. This Court has repeatedly held that as to two connecting carriers, each is the agent of the other. In Atlantic C. L. R. Co. v. Riverside Mills, 219 U. S. 186, wherein goods of a shipper were lost by a connecting carrier, this Court said, in discussing the Carmack amendment:

> "Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed when it receives property in one state to be transported to a point in another, involving the use of a connecting carrier for some part of the way, to have adopted such other carrier *as its agent*, and to incur carrier liability throughout the entire route, with the right to reinbursement for a loss not due to its own negligence."

And in Galveston H. & S. A. R. Co. v. Wallace, 223 U. S. 481, wherein recovery was had from a railroad for failure of its connecting carrier to deliver a shipment, it was held:

> "Under the Carmack amendment, as already construed in the Riverside Mills case, whenever the carrier voluntarily accepts goods for shipment to a point on another line, in another state, it is conclusively treated as having made a through shipment. It thereby elected to treat the connecting carriers *as its agents*, for all purposes of transportation and delivery."

If the Santa Fe accepted the car of corn from the Union Pacific for transportation by it over a part of a through shipment, then the Union Pacific must be treated as the agent of the Santa Fe, for the purpose of transporting the car from Yanka to its line.

The Railway Company would give the impression, in its argument, that damage was allowed Harold solely because of the misdating of the bill of lading. But it was the *delay* that caused Harold's damage. True, he relied on the bill of lading which showed shipment out of Kansas City on the 21st, but

him damage resulted from the refusal of his vendee to accept the corn on contract at Elk Falls, some 23 days after the bill of lading showed it had been shipped, (T. R. 6) and the Railway Company's excuse for such delay is, first, that the delay occurred on the line of its connecting carrier, and second, that the shipment was from Yanka, Nebraska, instead of from Kansas City. As Harold had to show *shipment* by the 21st, the bill of lading would have suited his purpose equally well, whether showing shipment on the 21st, from Kansas City, Topeka or Yanka, just so the Railway Company delivered the shipment at Elk Falls with reasonable dispatch thereafter.

In support of its contention that it was not bound by the recitations of its bill of lading, because the corn had not actually been received on the date thereof, the Railway Company cites numerous decisions. But the fact is apparent that if this shipment did not originate at Topeka, as far as plaintiff in error is concerned, it did originate at Yanka, Nebraska, and that the corn had been received for shipment by the connecting carrier not only on the date when the Railway Company issued its bill of lading, the 24th, but on the date indicated therein, the 21st.

All of the cases relied on by the Railway Company were decided long before the enactment of the Carmack amendment, which requires a railroad company to issue a bill of lading or receipt. Perforce, that requirement means a *correct* bill of lading, both as to date and place of receipt. If the Federal law applies to the shipment in question, surely the Railway Company was required thereby to issue a correct bill of lading, and to be responsible for damages for failure to do so.

In Shaw v. Railroad Co., 101 U. S. 557, where a bill of lading was stolen and sold, and the buyer claimed greater rights thereunder than the original owner might have had, it was not held that an innocent assignee had no such rights, but that, as he had knowledge that his assignor was not the owner thereof, he could not be an innocent assignee.

In Pollard v. Vinton, 105 U. S. 7, the decision is based on the premise that the agent who issued the bill of lading without receipt of the goods had authority to issue same *only* "for freight shipped on defendant's steamboat." Herein the authority of the Santa Fe agent to issue the bill of lading in question was not denied. In fact the Railway Company seems to concede his authority to issue the bill of lading on the 24th, when the property was still in the hands of the Union Pacific. And if

he could issue it at all before actual receipt of the goods by what legal principle could he issue it 4 days but not 7 days before?

In Iron Mountain R. Co. v. Knight, 122 U. S. 79, the cotton on which billing was issued before receipt was still in the hands of the *shipper* when the billing was issued, he well knowing such fact. In case at bar it certainly is not shown that the corn was in possession of Fisher when the bill of lading was issued, or that he knew where the corn actually was.

In Freidlander v. T. & P. Rly. Co., 130 U. S. 416, fraud was shown between the railroad agent and the pretended shipper, and that the agent acted beyond the scope of his authority, as was well known to party to whom the billing was issued.

In Mo. Pac. Rly. Co. v. McFadden, 154 U. S. 155, a bill of lading was issued on cotton still in the hands of the compress company, which cotton was burned before being actually received by the carrier. In holding that the railroad company was not liable to an assignee of such bill of lading, this Court said:

> "Of course in so concluding we proceed solely upon the admission which the exception to the answer necessarily imported and express no opinion as to what would be the rule of law if the compress company had not been the agent of the shipper, or if the goods had been *constructively* delivered to the carrier through the compress company, who held them in the carrier's behalf."

In case at bar, the authority of the agent to issue the bill of lading to Fisher on the 24th has not been questioned, nor has Harold's lack of knowledge of the actual date of receipt by plaintiff in error, nor Fisher's lack of knowledge of the whereabouts of the car of corn on the date he got the bill of lading. Nor is it contended that this car of corn was still in the hands of the shipper either on the 21st or the 24th, nor that Fisher or Harold were parties to any fraud in the issuance of the billing. And in the McFadden case, the latest decision relied on by the Railway Company, this Court particularly declines to express an opinion as to the liability of a carrier issuing billing on goods not actually received, where the goods have been *constructively* delivered to it, through an agent who holds them in the carrier's behalf. The least that can be said of the car in question was that it was constructively delivered to the Santa Fe on the 21st, by delivery to the Union Pacific, which then held it in behalf of its connecting carrier. When

plaintiff in error issued its bill of lading on the 24th, it knew from the Union Pacific billing surrendered to it that the car was then in possession of the Union Pacific, and had been since the 21st, and instead of requiring the actual car to be delivered to it before issuing the bill of lading, it in effect said to Fisher: We know that this car of corn is now in the hands of our connecting carrier, the Union Pacific, either en route to or at Topeka, and we will accept delivery of this car from you, by you giving us an order on the Union Pacific, and we will then undertake to get the car from the Union Pacific, it holding the car in the meantime as our agent, and in our behalf.

In conclusion we contend that the Supreme Court of Kansas did not err in any of the particulars set out by the Railway Company in its brief in its first three specifications or error, because:

Congress has not legislated relative to the liability of a carrier for issuing erroneous bills of lading, and that subject is under the control of the state.

If Congress has legislated on the subject, then the judgment of the state court was not obnoxious to such legislation, but directly in accord therewith, Harold's recovery having been based on damages resulting from delay either on the line of the plaintiff in error or of its connecting carrier, the Union Pacific.

Harold was entitled, as assignee of the bill of lading, to rely on all the recitations therein contained, as a valid contract of carriage had been entered into by the Railway Company and his assignor, on the date indicated in such bill of lading, the corn covered by the bill of lading having then been received by the agent of the plaintiff in error, its connecting carrier, and having passed out of the possession of the original shipper.

Even if Harold had no more rights as assignee of the bill of lading than his assignor had, he was still entitled to recover, as Fisher took the bill of lading in good faith, knowing that the corn had been shipped from Yanka on the 21st of September, the date of the bill of lading, and relying on the Santa Fe's assumption of the duty to get the car from its connecting carrier and to see that it was transported from point of origin to destination with reasonable dispatch.

II.

The fourth error specified by plaintiff in error in its brief herein, is that an improper measure of damages was allowed

to defendant in the State Courts. Harold, in his petition in the trial court, alleged that if the Railway Company had delivered the car of corn to his vendee at Elk Falls within a reasonable time *after* September 21st, (not *by* September 21st, as stated by the Railway Company) he would have received 63 cents a bushel therefor from Shoe & Jackson, but as the car was not delivered within a reasonable time, he received but 55 cents a bushel therefor, that being the highest market price at such later date. (T. R. 2-3.) And the evidence proved such allegations, Harold's vendee testifying that he refused to accept the corn at 63 cents a bushel because it did not arrive for about 30 days after date of shipment "and the price had then *declined* to 55 cents per bushel." Corn began to fall about the 1st of October. (T. R. 6-7.)

The State Court did not err in the measure of damages applied by it, because: its rule as to measure of damages is conclusive; it appears that the damage of 8 cents per bushel was in fact the depreciation in the market value between the time the corn should have been delivered, prior to October 1st, and the time when it was delivered, about October 14th; from their knowledge of the usual and ordinary course of such business it was reasonably within the contemplation of the Railway Company and the shipper at the time the bill of lading was issued that a breach of its contract of carriage by the Railway Company would result in a loss to the shipper of the difference between the price he would receive for the corn if delivered with reasonable dispatch, and the price he would receive on the open market if not delivered with reasonable dispatch.

As neither the Congress nor the State has legislated relative to the measure of damages allowable on a breach of a contract for transportation, such measure of damages must be determined by the common law. And as held in Eastern R. Co. v. Littlefield, 237 U. S. 140, where a judgment against a carrier for failure to furnish cars was in question, the common law liability of a railroad is a matter concluded by the decision of the State Supreme Court. If this Court has ever decided that there existed a Federal rule relative to measure of damages, different from that applied by the State Court herein, we have been unable to find same.

The judgment of the trial court, as affirmed, allowed Harold damages of 8 cents per bushel on the corn transported by the Railway Company, same arising from the delay in shipment.

Plaintiff in error contends that the true measure of damages is the depreciation in the market value between the time when the shipment should have been delivered and the time when it was delivered. It must be conceded that 55 cents per bushel was the market price of corn when the shipment in question was delivered by the Railway Company. The evidence shows that 63 cents per bushel was the market price at the time the corn should have been delivered, as the witness Jackson testified (T. R. 6) that the price of corn had declined from the contract price, 63 cents, to 55 cents, beginning to fall about October 1st. If the corn had been transported with reasonable dispatch, two or three days, it would have arrived at Elk Falls before the price began to fall, and the trial court was certainly justified in finding that the 8 cents a bushel allowed as damages, represented the difference in price between the time when the corn should have been delivered and when it was delivered.

It is again contended that the difference between the contract price (assuming that such was not the market price at the time) and the market price at date of delivery, comprised special damages not reasonably within the contemplation of the Railway Company and the shipper at the time the bill of lading was issued. The Supreme Court of Kansas found (T. R. 16) that the usual and ordinary course of business known to both shipper and carrier afforded sufficient information to the Railway Company to put it reasonably within its contemplation that if it failed to transport the corn with reasonable dispatch, it would be liable to the shipper for the natural, direct and proximate result of its breach, and that its breach would result in a loss to the shipper equal to the difference between the price at which he had the corn sold, and which he would receive for same on the market if the shipment was not delivered within a reasonable time. The Railway Company might well have known, from the usual course of such business, that the shipper had that car of corn sold at a certain price, which he would not get if it was not delivered within a reasonable time after September 21st, and the loss to the shipper, of the difference between the contract price and the later market price, should certainly have been within the contemplation of the Railway Company, when it undertook the shipment.

III

In its fifth and sixth errors specified in its brief the Railway Company contends that the allowance of an attorney's fee to

defendant in error under a Kansas statute was error, as such statute is a nullity as affecting interstate commerce.

Harold, in his petition in the trial court, asked for the allowance of a reasonable attorney fee, and upon the Railway Company's admission that it was reasonable, he was given judgment for a $50.00 fee. If the trial court found that the shipment was intrastate, this Court is not concerned with such allowance. If it found it to be interstate, Harold was entitled to the judgment for attorney's fee, regardless of the Kansas statute.

The amendment to section 20 of the Commerce Act provides that a railroad, upon receipt of goods for shipment, shall issue a receipt or bill of lading, etc. Section 8 of the same Act provides that if a railroad shall faid to do anything required to be done by the act, it shall be liable to the person injured for damages suffered, together with a reasonable attorney's fee to be collected as part of the costs in the case. Obviously a railroad is required to issue a correct bill of lading, and the issuance of an erroneous bill is certainly not a compliance with the Carmack amendment. To hold that a railroad could comply with the law by issuing a bill of lading incorrect as to date, place of receipt, commodity carried, or any other particular, would proclaim the law a farce.

In case at bar the Railway Company violated the law by issuing an incorrect bill of lading. Harold, as the evidence showed, was damaged as a result of such violation. Then under the Commerce Act itself is he not entitled to recover not only his damages, but also a reasonable attorney's fee? We cannot see how the allowance of an attorney's fee to Harold by the State courts can be obnoxious to the Federal laws.

While the trial did not indicate under what law it allowed the attorney's fee to Harold, nor did the assignment of errors made by the Railway Company on its appeal to the Supreme Court of Kansas, yet the opinion of the Supreme Court decided that Harold was entitled to recover such fee under section 7107 of the General Statutes of Kansas, as the judgment was in part for loss of grain in transit. As to the vitality of that law, or its meaning, the decision of the State Court is conclusive. In Price v. Illinois, 238 U. S. 446, in finding a state law valid, this Court held:

> "The plaintiff in error challenges the correctness of this construction (of the state law), but

> this question is simply one of local law with which we are not concerned. We accept the decision of the Supreme Court of the State as to the meaning of the statute and, in the light of this construction, the validity of the act under the Federal Constitution must be determined."

So the only question before this Court relative to the Kansas statute is as to whether it is a burden on interstate commerce. It will be noted that it is not contended that this statute is repugnant to the "equal protection" clause of the 14th amendment.

The Supreme Court of Kansas held that the statute in question "is a measure in exercise of the police power of the State, and does not assume to regulate commerce between the States." If it does not assume to regulate commerce, the only question is whether it is a burden on interstate commerce.

The Kansas statute provides:

> "In all cases in which judgment shall be rendered against a railway company for loss or shortage on grain, seed or hay shipped, the magistrate or court shall also render judgment for a reasonable attorney's fee for the plaintiff's attorney."

We contend that this statute is an exercise of the police power of the state, does not impose a penalty on the railroad, does not affect the ground of recovery or the measure of recovery, and as it allows only a reasonable attorney's fee when judgment is had against a railroad company, that same is not a burden on interstate commerce, and hence that the law is valid.

Many of the decisions of this Court, cited by plaintiff in error, wherein state laws allowing attorney fees were considered, were decided on the question of constitutionality, not repugnance to the Commerce laws. In Gulf & S. F. Ry. Co. v. Ellis, 165 U. S. 150, a Texas statute allowing attorney fees in certain recoveries against roalroads, was held to be invalid under the "due process" clause of the 14th amendment to the Constitution, and no question of the police power of the state was involved. And in M. K. & T. Rly. Co. v. Cade, 233 U. S. 642, a very similar Texas statute was again considered and held valid, as not repugnant to the "equal protection" and "due process" clauses of the 14th amendment. Herein no interstate shipment was involved and the Commerce laws were not considered. And so in the recent case from this state, A. T. & S. F. Rly. Co. v. Vosburg, 238 U. S. 56, the reciprocal demurrage

law of Kansas, as it allowed an attorney fee in certain cases against a railroad, was held unconstitutional under the "equal protection" clause of the 14th amendment. No question was decided as to the law being obnoxious to interstate commerce.

Other decisions where in a carrier has been directly penalized by state laws declare such laws to be obnoxious to interstate commerce and invalid, without the police power of the states being determined. In Southern Ry Co. v. Reid, 222 U. S. 425, this Court held invalid a North Carolina statute which penalized the refusal of a railroad to accept freight to a point out of the state, where no through tariff was published, holding that such law was directly in conflict with the Carmack amendment. But the police power of the state was not considered. In St. L. I. M. & S. Rly Co. v. Edwards, 227 U. S. 265, a demurrage law of Arkansas was held in conflict with the Commerce laws, because it attempted to procure prompt deliveries of freight by carriers by exacting a per diem penalty of the carrier for failure to notify consignees promptly of arrival of shipment. This decision follows that in C. R. I. & P. Ry. Co. v. Hardwick Elev. Co., 226 U. S. 426, where a similar statute of Minnesota was held invalid for the same reason. In neither of these cases was the police power of the states involved.

In decisions based on the police power of the states to allow attorney fees to successful claimants in certain cases, the state laws have been held valid. In A. T. & S. F. Rly. Co. v. Matthews, 174 U. S. 96, a Kansas statute, allowing recovery of attorney's fee in successful prosecutions against a railroad for damages resulting from fires, was held valid. This Court there held that the Kansas Supreme Court had found the statute valid, and referred to such ruling, "not as conclusive, but as an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment." While this decision was rendered before the passage of the Carmack amendment, and did not pass on the effect of the law on commerce, yet the last paragraph of the opinion may be pertinent:

> "Our conclusion in respect to this statute is that, for the reasons above stated, *giving full force to its purpose as declared by the Supreme Court of Kansas*, to the presumtion which attaches to the action of a legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the Supreme Court of Kansas is affirmed."

Under the same principle, this Court will no doubt give full force to the purpose and validity of the law in question, as declared by the Supreme Court of Kansas in its decision complained of, and its previous decision concerning the same law in the case of Railway Co. v. Simonson, 64 Kan. 802, referred to in the later decision. In the Simonson case the Kansas Court held:

> "The statute allows an attorney's fee for the successful prosecution of a case under its provisions. The reason for this is the negligence of the carrier in failing safely to transport and de liver goods committed to its charge. The case in that respect comes fully within the principle of Railway Co. v. Matthews, 58 Kan. 447, affirmed by the Supreme Court of the United States in 174 U. S. 96."

In Mo. Kan. & Tex. Ry. Co. v. Harris, 234 U. S. 412, this court has directly determined all of the questions raised herein, and in favor of the validity of a Texas statute very similar to the Kansas statute in question. The Texas statute is set out in full in the Cade case, supra, and provides for the recovery by the succesful plaintiff of a reasonable attorney's fee of not over $20.00 on claims not exceeding $200.00 against persons or corporations for labor, material, freight overcharges, or for lost or damaged freight or for stock injured or killed.

After discussing the Cade case, wherein this law was held not violative of the 14th amendment, this Court holds:

> "It remains to be considered whether the Texas statute, as applied to claims for loss or damage to interstate freight while in the possession of the carrier in the state of Texas is repugnant to this Federal legislation." (The Carmack amendment.)
>
> "It is permissable for a state, as a part of its legal procedure, to permit the allowance of a reasonable attorney's fee, under proper restrictions. In claims of this character, based upon the ordinary liability of the common carrier, although regulated by the commerce act, the state courts have full jurisdiction and some difference respecting the allowance of costs and the amount of the costs are inevitable, as being peculiar to the forum. And we think that where a state, as in this instance, for reasons of internal policy, in order to offer a reasonable incentive to the prompt settlement of small but well-founded claims, and as a deterrent of

> groundless defenses, establishes by a general statute otherwise unexceptional the policy of allowing recovery of a moderate attorney's fee as a part of the costs, in cases where, after specific claim made and a reasonable time given for investigation of it, payment is refused, and the claimant succeeds in establishing by suit his right to the full amount demanded, the application of such statute to actions for goods lost in interstate commerce is not inconsistent with the provisions of the Commerce Act and its amendments. The local statute, as already pointed out, does not at all affect the ground of recovery, or the measure of recovery; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak, the state may enforce it in such a case as the present."

As said by the Kansas Supreme Court in its opinion herein, in discussing the difference between the statute before it, and the Texas statute referred to:

> "This difference does not appear sufficient to make an allowance of an attorney's fee a burden upon interstate commerce in prosecutions for damages under one statute and not under the other."

> "While some points of difference between the Texas statute and the Kansas statute now under consideration are suggested, it is difficult to formulate any distinction in principle that would make the provision relating to an attorney's fee in one valid and the other invalid."

In Charleston & W. C. R. Co. v. Varnville Furn. Co., 237 U. S. 597, a South Carolina statute which penalized carriers for failure to pay certain claims within a limited time, was held repugnant to the Commerce laws, as affecting interstate shipments. And in differentiating from the Texas statute referred to in the Harris case, this Court held that while the Texas statute does not, the South Carolina "overlaps the Federal act in respect of the subject, the grounds, and the extent of liability for loss."

Plaintiff in error attempts to make the same language apply to the Kansas statute in question, but in doing so applies it to the whole act, of which the attorney fee statute is a part. The decision of the Supreme Court of Kansas, of which plaintiff in error complains, pertains only to the allowance of attorney fees. And the State Court has held that statute valid, regardless of the validity of other sections of the Act in which it appears. So we contend that the only question to be determined

by this Court herein is whether the specific statute, which the State Court found valid, is obnoxious to Federal laws pertaining to commerce, and whether the Railway Company has been denied any Federal right or immunity by the statute so held valid by the Supreme Court of Kansas.

We do not think that the Supreme Court of Kansas erred in finding the attorney's fee statute in question not repugnant to the Federal Commerce laws.

CONCLUSION.

Defendant in error contends that the decision of the Supreme Court of Kansas, sought to be reviewed herein, is repugnant to no provision of the Commerce Act, as amended, and that the Supreme Court of Kansas did not err in any of the particulars specified, and we respectfully ask that its judgment be affirmed.

Respectfully submitted,

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